Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2010

Thomas Warne v. Jeffrey Warne : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Edward R. Munson, Ryan M. Harris; Jones, Waldo, Holbrook, and McDonough; Attorneys for Appellee.
Clark R. Nielsen, Kathryn J. Steffey; Smith Hartvigsen, PLLC; Attorneys for Appellant.

Recommended Citation
Brief of Appellant, *Thomas Warne v. Jeffrey Warne*, No. 20100125.00 (Utah Supreme Court, 2010).
https://digitalcommons.law.byu.edu/byu_sc2/3025

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

THOMAS WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust, Plaintiff/Appellee vs. JEFFREY WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust, Defendant/Appellant.	**Brief of Appellant Jeffrey Warne** Appellate Case No. 20100125 District Court Case No. 080907826

Appeal from the Third Judicial District Court, Salt Lake County, Utah
The Honorable Paul G. Maughan, District Court Judge

Edward R. Munson
Ryan M. Harris
JONES, WALDO HOLBROOK & MCDONOUGH
170 South Main Street #1500
Salt Lake City, Utah 84101
Attorneys for Plaintiff/Appellee Thomas Warne

Clark R. Nielsen (2406)
Kathryn J. Steffey (10245)
SMITH HARTVIGSEN, PLLC
215 S. State Street, Suite 600
Salt Lake City, UT 84111
Attorneys for Defendant/Appellant Jeffrey Warne

FILED
UTAH APPELLATE COURTS
JUN 07 2010

IN THE UTAH SUPREME COURT

THOMAS WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust,

Plaintiff/Appellee

vs.

JEFFREY WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust,

Defendant/Appellant.

Brief of Appellant Jeffrey Warne

Appellate Case No. 20100125

District Court Case No. 080907826

Appeal from the Third Judicial District Court, Salt Lake County, Utah
The Honorable Paul G. Maughan, District Court Judge

Edward R. Munson
Ryan M. Harris
JONES, WALDO HOLBROOK & MCDONOUGH
170 South Main Street #1500
Salt Lake City, Utah 84101
Attorneys for Plaintiff/Appellee Thomas Warne

Clark R. Nielsen (2406)
Kathryn J. Steffey (10245)
SMITH HARTVIGSEN, PLLC
215 S. State Street, Suite 600
Salt Lake City, UT 84111
Attorneys for Defendant/Appellant Jeffrey Warne

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j) (2009). On February 17, 2010, this Court transferred this appeal to the Utah Court of Appeals subject to the right of the parties to request that the Court retain the matter. This Court subsequently vacated its February 17th order of transfer and elected to retain jurisdiction over this appeal by Order dated March 18, 2010.

ISSUES AND STANDARDS OF REVIEW

Appellant, Jeffrey Warne ("Jeff"), individually and as Trustee of the Ira B. Warne Family Protection Trust, presents the following issues in this appeal:

1. Did the district court err in granting Plaintiff Thomas Warne's ("Tom") Motion for Partial Summary Judgment and in ruling that Ira Warne's ("Ira") partial revocation of his living trust was invalid based upon the language in *Banks v. Means*, 2002 UT 65, 52 P.3d 1190, when, unlike the settlor in *Banks*, who, within just one month prior to her death, executed only three replacement pages that conflicted with the stated and unmodified purpose of her trust, Ira executed a Partial Revocation that clearly evidenced his intent to disinherit Tom over four years prior to his death and also subsequently wrote a letter confirming his reasons for disinheriting Tom, which included the fact that Ira believed Tom had made more than one attempt to steal money from him? (Issue Preserved: R.465-68; 560:16-17.)

Standard of Review: "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving

party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation and citation omitted).

2. Did the district court err in failing to apply Utah Code Ann. § 75-7-605?

a. Did the district court err in granting Tom summary judgment and ruling that Ira's Partial Revocation of his living trust is invalid based upon *Banks v. Means*, 2002 UT 65, 52 P.3d 1190, when *Banks* has been superseded by the adoption of Section 75-7-605 of the Utah Uniform Trust Code? (Issue preserved: R.560:26; 530-33.)

Standard of Review: "Review of a trial court's grant of summary judgment includes a determination of whether the trial court correctly applied governing law, affording no deference to the trial court's determination or conclusions of law." *Burton v. Exam Center Indus. & General Medical Clinic, Inc.*, 2000 UT 18, ¶ 4, 994 P.2d 1261. In conducting such a review, this Court "views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis*, 2008 UT 2 at ¶ 6 (internal quotation and citation omitted).

b. Did the district court err in denying Jeff's Motion to Alter or Amend Judgment on the ground that Jeff failed to raise the issue of whether *Banks v. Means* has been superseded by Utah Code Ann. § 75-7-605 when Jeff argued for the application of Utah Code Ann. § 75-7-605 at oral argument and the district court declared that it had taken under advisement "the parties' written

submissions, the relevant legal authority and counsel's oral argument"? (Issue Preserved: R.530-33.)

Standard of Review: Generally, district courts are afforded "broad discretion to grant or deny a motion for a new trial" pursuant to Rule 59 of the Utah Rules of Civil Procedure. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064. However, when the judge deciding the Rule 59 motion is "a stranger to the case," this Court gives "his decision no deference" and reviews the decision "under a correction of error standard." *Mann v. Fredrickson*, 2006 UT App 475, ¶ 6, 153 P.3d 768.

3. Did the district court err in granting Tom summary judgment on Jeff's counterclaim in its entirety, including Jeff's request to reform the Ira B. Warne Family Protection Trust pursuant to Utah Code Ann. § 75-7-415, when Jeff presented substantial evidence that Ira intended to reserve for himself the power to revoke his living trust, in whole or in part, and that Ira executed the Partial Revocation with the express intent of avoiding the consequences of the *Banks v. Means* ruling? (Issue Preserved: R.468-70.)

Standard of Review: "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis*, 2008 UT 2 at ¶ 6 (internal quotation and citation omitted).

4. Did the district court err in granting Tom's Motion for Partial Summary Judgment and ruling that Tom was entitled to one-half of the personal property of Ira's

estate when Ira executed a pour-over will that transferred all of his personal property to the Trust? (Issue preserved: R.470-71.)

Standard of Review: "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis*, 2008 UT 2 at ¶ 6 (internal quotation and citation omitted).

DETERMINATIVE STATUTES AND RULES

Jeff attaches as addenda to this brief a copy of the following determinative statutes and rules:

(A) Utah Code Ann. § 75-7-415 (2009);

(B) Utah Code Ann. § 75-7-605 (2009); and

(C) Utah R. Civ. P. 59.

STATEMENT OF THE CASE

1. Nature of the Case

This appeal concerns the validity of the Partial Revocation of and Amendment to the Ira B. Warne Family Protection Trust (hereinafter "Partial Revocation"), executed by Defendant Jeffrey's ("Jeff") and Plaintiff Thomas' ("Tom") father, Ira B. Warne ("Ira"). Despite substantial evidence that Ira executed the Partial Revocation for the sole purpose of disinheriting Tom, the district court granted summary judgment in favor of Tom and declared the Partial Revocation invalid. In so ruling, the district court relied on the language of *Banks v. Means*, 2002 UT 65, 52 P.3d 1190, which states that a complete revocation, rather than a mere amendment, is required to divest a beneficiary of a vested

interest in a trust. *Id.* at ¶ 12.

2. Course of Proceedings and Disposition Below

This appeal arises from a complaint filed by Tom on May 12, 2008, in the Third Judicial District Court for the State of Utah. (R.1-6.) Tom's complaint, as subsequently amended, sought to invalidate the Partial Revocation, which, if enforced, would have divested Tom of all interest in his father's trust.[1] (R.47-51.) In response, Jeff, individually and in his capacity as trustee of the Ira B. Warne Family Protection Trust (the "Trust"), filed a counterclaim, requesting that the Trust be reformed pursuant to Utah Code Ann. § 75-7-415 to reflect Ira's intentions. (R.162-172.)

On July 15, 2009, Tom moved for summary judgment on certain of his claims and on Jeff's counterclaims. (R.317-30, 458-60.) Specifically, Tom requested that the district court declare Ira's Partial Revocation invalid and unenforceable under *Banks v. Means*, 2002 UT 65, 52 P.3d 1190. (R.321-24.) Tom also requested that the district court hold that Ira's codicil, executed at the same time that Ira signed the Partial Revocation, did not alter the distribution provisions of Ira's will. (R.324-25.) Finally, Tom requested that the district court find that he and his brother, Jeff, are co-trustees and equal beneficiaries of their mother's trust, the Avis P. Warne Family Protection Trust. (R.325-26.)

Jeff opposed the motion, arguing that the language of the Trust clearly provided

---

[1] Tom amended his complaint to include the trustees of the Ira B. Warne Family Protection Trust and the Avis P. Warne Family Protection Trust after the district court granted Jeff's Motion to Dismiss for Failure to Join an Indispensable Party or Alternatively, Motion for Joinder of Indispensable Party. (R.143-46; 149-157.)

that Ira may revoke the Trust "in whole or in part." (R.465.) Because Ira's intent to disinherit Tom was unambiguously expressed in both the Partial Revocation and in a letter written four years after Ira executed the Partial Revocation, Jeff argued that the court should not disregard Ira's expressed intent, desires, and instructions regarding the distribution of his property simply because Ira's counsel did not prepare a complete revocation of the entire Trust. (R.465-68.) Jeff also argued that, in the event the district court determined that the Partial Revocation is invalid, Ira's Trust should be reformed pursuant to Section 75-7-415, Utah Code Ann., to properly reflect Ira's intent. (R.468-70.) Finally, Jeff asserted that, because Ira's will was a pour-over will, the district court should find that all of Ira's assets were transferred to the Trust. (R. 470.)

After the motion was briefed but before oral argument was held, Jeff engaged new counsel to represent him in this matter. (R.512-13.) Thereafter, oral argument was held on October 26, 2009, before the Honorable Robert P. Faust. (R.517.) During oral argument, Jeff's new counsel of record argued that the holding in *Banks* had been superseded by the Uniform Trust Code and, more specifically, Utah Code Ann. § 75-7-605, which was adopted by the Utah Legislature approximately two years after the Utah Supreme Court issued the *Banks* decision. (R.560:25-26.) In addition to raising this dispositive statute before the district court, counsel for Jeff provided both the district court and opposing counsel with copies of the statute. (R.560:9, 25.) Although "not[ing]" that Section 75-7-605 had not been addressed in the written memorandum opposing the motion for summary judgment, counsel for Tom did not object to the court's consideration of the statute and, in fact, argued that the statute did not apply to the

case at bar. (R.560:27, 32-33.) (A copy of relevant portions of the October 26, 2009 Oral Argument Transcript is attached hereto as Addendum D.)

After oral argument, the district court "took the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsel's oral argument." (R.518.) On November 18, 2009, the district court issued its Memorandum Decision. (R.518-22.) (A copy of the Memorandum Decision is attached hereto as Addendum E.) The district court's decision did not address application of Section 75-7-605 of the Utah Code and instead held that Ira's Partial Revocation of his Trust to disinherit Tom was invalid under *Banks v. Means*. Specifically, the court declared that it could not "override *Banks* by interpreting the Ira Trust language as requiring merely a partial revocation when the Utah Supreme Court has clearly indicated that a complete revocation and a return of property is required." (R.520.)

The district court similarly refused to reform the Trust to reflect Ira's stated desires and instructions regarding the distribution of his property, declaring that "[t]his is not a case where the settlor was mistaken about the law or was unclear about how to accomplish his purposes. Instead, being fully aware of *Banks*, Ira and his counsel simply sought to accomplish an end run around this opinion." (*Id.*) Finally, the district court held that Ira's codicil did not alter the distribution provisions of Ira's will, and, as such, Tom "is entitled to one-half of the personal property included in Ira's estate." (R.521.)

Because the district court failed to address the newer provisions of the Uniform Trust Act, Jeff timely moved to alter or amend the court's decision pursuant to Rule 59 of the Utah Rules of Civil Procedure. (R. 523-25.) In his motion, Jeff again asserted that

the validity and effect of the Partial Revocation should be determined by reference to the provisions of the Uniform Trust Code, which supersedes the holding of *Banks v. Means*. (R.523-25; 530-33.) Because the Uniform Trust Code specifically provides that a settlor may effectively revoke or amend his trust by "substantially complying with a method provided in the terms of the trust," Utah Code Ann. § 75-7-605(3)(a), Jeff requested that the district court amend its judgment to declare that the Partial Revocation is valid and must be given effect. (R.530-33.) In the alternative, Jeff requested that the district court certify its ruling as final for purposes of appeal. (R.533.)

After the parties fully briefed Jeff's Motion to Alter or Amend, the case was transferred from Judge Faust to Judge Maughan. Judge Maughan then issued his Ruling and Order on Rule 54(b) Certification on January 12, 2010, denying Jeff's motion. (R.552A-552D.) (A copy of the Ruling and Order on Rule 54(b) Certification is attached hereto as Addendum F.) The district court did, however, certify the decision as final. (R.552C.) Jeff now appeals the summary judgment and the refusal to alter or amend.

STATEMENT OF FACTS

On July 15, 1991, Ira B. Warne, the father of Jeff and Tom Warne, executed the Ira B. Warne Family Protection Trust (the "Trust"). (R.332.) (A copy of the Trust is attached hereto as Addendum G.) The Trust was established "for the primary benefit of the Undersigned [Ira] during [his] lifetime, for [Ira's] surviving spouse, and for [Ira's] family thereafter," which was defined as Ira's wife, Avis P. Warne, and his two children, Tom and Jeff Warne. (*Id.*) The Trust provided that, after the deaths of Ira and his wife, Avis, the Trust corpus should be divided equally among Tom and Jeff. (R.337.) The

Trust also designated Tom and Jeff as successor co-trustees, with "complete power and discretion" to manage and administer the Trust. (R.339, 344.)

Despite his designations of beneficiaries and successor trustees, Ira specifically reserved for himself the power to amend any provision of the Trust. Specifically, Ira included a provision in the Trust which provided that, as long as Ira is alive, he "reserves the right to amend, modify or revoke this Trust ***in whole or in part***, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of th[e] Trust may be ***in whole or in part*** by written instrument." (R.333, ¶ 3.1 (emphasis added).) Ira's wife, Avis, executed a similar trust on the same date with similar provisions. (R104-14.) Along with their trusts, the Warnes also executed "pour-over" wills on July 15, 1991.[2] (R.353-58.)

Over eleven years after Ira executed the Trust, the Utah Supreme Court issued its decision in *Banks v. Means*, 2002 UT 65, 52 P.3d 1190. In that opinion, the Court interpreted a trust executed by Ms. Banks that contained a provision identical to that found in paragraph 3.2 of Ira's Trust. That provision provided that "[t]he interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death." *Id.* at ¶ 12. The Court held that such language required that Ms. Banks' trust be completely revoked rather than merely amended in order to divest the trust's beneficiaries of their vested interests in the trust. *Id.* at ¶ 16. Indeed, the Court declared as follows:

---

[2] Avis Warne died on April 13, 1998, leaving Jeff and Tom as the remaining contingent beneficiaries of the Ira Trust.

> By the plain language of the trust, the beneficiaries have vested interests that continue until the interests are revoked or terminated. Here, Ms. Banks reserved the power to revoke, modify, or amend the trust in whole or in part in section 3.1, but limited that power in section 3.2 with regard to the beneficiaries. Thus, a complete revocation was required to divest the beneficiaries of their vested interests.

Id. at ¶ 12.

Several years after Ira executed the Trust, the relationship of Ira and Tom deteriorated to such an extent that Ira sought to amend his estate planning documents to completely disinherit Tom. (R.360-66, 463-64.) Specifically, Ira executed a "Partial Revocation of and Amendment to the Ira B. Warne Family Protection Trust" (hereinafter "Partial Revocation") and a "Codicil to the Last Will and Testament of Ira B. Warne" (hereinafter the "Codicil"). (R.360-366, 463, 482-84.) (Copies of the Partial Revocation and Codicil are attached hereto as Addendum H and Addendum I, respectively.) The Partial Revocation revoked the provision setting forth the purpose of the Trust, as well as the Trust's original definition of Ira's "family." (R.360-61.) The Partial Revocation also revoked the provision designating Tom and Jeff as successor co-trustees of the Trust. (R.361.) Finally, recognizing the Utah Supreme Court's opinion regarding the interpretation of paragraph 3.2, the Partial Revocation revoked paragraph 3.2 in its entirety, adding that the "Grantor [Ira] specifically wishes to preempt the results of the case Banks v. Means." (R.360.)

In place of the revoked provisions, Ira inserted new paragraphs that set forth the purpose and distribution provisions of his Trust. (R. 361-63.) Each of these new, inserted paragraphs excluded Tom. For example, Ira inserted a provision entitled

"Primary Beneficiaries," which provided that, "[f]ollowing the Grantor's death, the Trustees shall distribute, pursuant to the terms of this Agreement, Trust Assets to the Primary Beneficiaries, who include those, and only those, listed by name or referred to as follows: Jeffrey D. Warne." (R.361.) Ira also included a new specific provision in his Trust that addressed his exclusion of Tom, which stated as follows:

> The Undersigned [Ira] has in mind but makes no provision herein for Thomas W. Warne, or his issue, or any other individual not specifically referred to in the Agreement by name or class, whether an heir or not. Notwithstanding anything to the contrary in this Agreement, said individuals shall not be deemed "Beneficiaries" as those terms are defined in the Trust Agreement or in this Amendment, and shall not be entitled to receipt of any Trust assets. ***This pretermission is intentional and binding.***

(R.361-62 (emphasis added).)

Consistent with his Partial Revocation, Ira's Codicil also amended his Last Will and Testament to exclude Tom as a joint personal representative of Ira's estate. (R.482.)

On May 12, 2007, over four years after he executed the Partial Revocation and Codicil, Ira detailed his reasons for disinheriting Tom in a separate written letter signed by him. (R.486.) Ira stated, "I, Ira Warne, am an individual over 18 years of age, and of sound mind. I have disinherited my son Tom Warne, for the following reasons, this is from my own personal knowledge, and I expect my wishes to be followed." (*Id.*) Ira then listed several major disputes that he had with Tom, including a dispute that resulted from Tom's conduct as executor of the estate of Ira's cousin, Marian Smith.[3] (*Id.*) With respect to this dispute, Ira stated that "[w]hen my Cousin Marian Smith died, I had to hire a Lawyer to receive my inheritance. This took years and [Tom] refused to pays [sic] us

[3] Ira had been designated a beneficiary of his cousin Marian's estate.

in a timely manner. Tom was the Executor of this estate and intentionally held up paying the heirs in the estate." (*Id.*) Additionally, Ira complained that, as executor, Tom "took the maximum Executor fee allowed by law." (*Id.*)

Ira also detailed his concerns about Tom's conduct just prior to the death of Marian Smith, stating,

> Tom Warne and Ross Maghan stole $570,000 out of Marian Smith accounts when she was sick and in the Hospital. They also took $320,000 out in the name of Farmland [a company owned by Tom and Mr. Maghan]. I do not understand why they believe they deserved the money? I believe this was a direct and intentional way to steal my money.

(*Id.*) Based on Tom's actions as executor, Ira and Tom had become adverse parties in litigation involving the Marian Smith estate. (R.464.)

Finally, Ira described a dispute with Tom, in which Tom purported to transfer Ira's and Avis Warne's interest in real property to Tom's ex-wife in Tom's divorce settlement. (*Id.*) In addressing this dispute, Ira stated as follows:

> I never had any intentions of giving my interest in the 1029 south 400 East apartments to Tom Warne's ex-wife Christie. I was never asked, or informed, about any of our interest in the 4-plexes, nor were we involved in Tom and Christie's divorce. We only found out about Tom and Christie's property settlement after the divorce papers were final. Tom Warne tried to give away 10% of my interest without ask[ing] or informing Avis or myself. No one but Avis or myself had the right to say where our interest, if any should go.

(*Id.*)

At the conclusion of his letter, Ira stated, "I would appreciate my wishes to be followed and for nothing more to be said or acted on in regards to this matter." (*Id.*) Approximately three months after signing the letter detailing his reasons for disinheriting

Tom, Ira died of prostate cancer on August 27, 2007. (R.529.) Prior to and at the time of Ira's death, Tom had been estranged from, and had even engaged in litigation against, his father. (R.491.)

On May 12, 2008, Tom filed suit against Jeff. (R.1-6.) In his complaint, Tom requested that he be provided with Ira's will, and he also sought to invalidate any amendments or changes to the Trust or Ira's will that removed Tom as a beneficiary on the grounds of undue influence and/or lack of testamentary capacity. (R.3-6.) Tom subsequently amended his complaint to request that the Partial Revocation be declared invalid pursuant to the holding of *Banks v. Means*. (R.151-52.) In his Counterclaim, Jeff, individually and in his capacity as trustee of the Trust, requested a judgment declaring Jeff to be the sole trustee and beneficiary of the Trust. (R.169-70.) Jeff's Counterclaim also requested that, in the event the district court found that the Partial Revocation was ineffective, the Trust be reformed pursuant to Utah Code Ann. § 75-7-415 to conform to Ira's intention's regarding the distribution of his property. (R.170.)

On July 15, 2009, Tom moved for partial summary judgment on portions of his First and Third Causes of Action and on Jeff's counterclaims. (R.317.) In that motion, Tom asserted Ira's failure to comply with the language of *Banks v. Means* as the only basis for invalidating the Partial Revocation. (R.321-24.) Both the memorandum supporting Tom's motion and the memorandum opposing the motion did not address the relevant statutory authority applicable in this case, *i.e.*, Utah Code Ann. § 75-7-605. (*See* R.317-30, 461-72.) After the motion was briefed by the parties but before oral argument, Jeff engaged new legal counsel to represent him. (R.512-13.)

The motion for summary judgment was argued before the Honorable Robert Faust, the district court judge assigned to the matter. During oral argument, held on October 26, 2009, Jeff's new legal counsel argued the applicability of Section 75-7-605 (enacted in 2004—two years after *Banks* was issued) and provided both the district court and opposing counsel with copies of the statutory language. (R.560:9, 25.) In discussing Section 75-7-605, Jeff argued that the statute, which expressly provides that substantial compliance is the test with which to determine whether a settlor has effectively revoked or amended his trust, has superseded the holding of *Banks v. Means*, which was issued two years before the adoption of Section 75-7-605 and which required strict compliance. (R.560:25-26.)

Although the district court stated that it "took the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsel's oral argument," (R.518), the court's Memorandum Decision, issued November 18, 2009, did not address the applicability of Section 75-7-605 of the Uniform Trust Act. (R.518-22.) Rather, the decision relied solely upon the language of *Banks v. Means* to invalidate Ira's Partial Revocation. (R.520.) Because the district court had failed to address the controlling authority argued at the hearing, Jeff moved the court to alter or amend its judgment to hold that the effectiveness of the Partial Revocation should be determined by Section 75-7-605, not *Banks v. Means*. (R. 523-25.) Without notice to the parties, the matter was reassigned to Judge Paul Maughan. On January 11, 2010, Judge Maughan issued his ruling that denied Jeff's motion to alter or amend, stating that "the [statutory] argument was not properly before the [c]ourt and need not have been

considered by the [c]ourt. Further, the [c]ourt sees no legal or factual basis to otherwise alter or amend the Memorandum Decision." (R.552B.) The court did permit Rule 54(b) certification, certifying that the partial summary judgment was a final judgment as to the issue of Tom's claims regarding the Trust. (R.552B-552C.) The Rule 54(b) final judgment was entered on January 29, 2010. (R.553-56.)

SUMMARY OF ARGUMENT

The position urged by Tom and adopted by the district court below is that Ira's expressly stated intentions regarding the distribution of his property are irrelevant to the resolution of Tom's claims. Indeed, Tom specifically argued below that "Ira's intent to disinherit [Tom] is immaterial." (R.500.) But such an argument is not supported by, and, in fact, is contrary to the provisions of the Uniform Probate Code, which mandate that the provisions of the Code be "liberally construed and applied" to "discover and make effective the intent of a decedent in the distribution of his property." Because the district court failed to apply Utah law in an effort to discover and make effective Ira's intent in the distribution of his property, this Court should (1) reverse the district court's ruling that Ira's Partial Revocation is invalid, (2) reverse the district court's denial of Jeff's Motion to Alter or Amend Judgment, (3) reverse the district court's refusal to reform the Trust pursuant to Section 75-7-415, and (4) reverse the district court's ruling that Tom is entitled to one-half of the personal property in Ira's estate.

First, this Court should reverse the district court's ruling that Ira's Partial Revocation is invalid pursuant to the language of *Banks v. Means* because the factual circumstances of this case, which are clearly distinguishable from *Banks*, were not presented to or considered by the *Banks* Court. For example, unlike *Banks*, Ira clearly and unequivocally expressed his desire to disinherit Tom on multiple occasions over several years, and he executed the Partial Revocation to carry out his intentions. Moreover, unlike in *Banks*, Ira revoked the relevant governing provisions of his Trust

rather than merely amending them to ensure that the Partial Revocation would be effective. Given these and other facts, it was error for the district court to require a complete revocation and return of the property to the trustor based upon the limited and distinguishable facts of *Banks*.

Second, the Court should hold that the district court erred by invalidating Ira's Partial Revocation based upon the language of *Banks* because the *Banks* decision has been superseded by statute. Specifically, unlike *Banks*, which required strict compliance with the terms of the trust to divest a beneficiary of an interest, Section 75-7-605 provides that a settlor may revoke his trust by substantially complying with the terms of the trust. Because Section 75-7-605 applies to all trusts created on or before July 1, 2004, the district court should have applied the statute in this case to properly determine whether the Partial Revocation was valid. By failing to do so, the district court erred.

The district court also erred in denying Jeff's Motion to Alter or Amend Judgment on the ground that Jeff failed to adequately raise the applicability of Section 75-7-605. The record clearly establishes that counsel for Jeff argued at oral argument before the district court that Section 75-7-605 superseded *Banks*, providing the district court with an opportunity to rule on the issue. The district court therefore erred by failing to consider the applicability of Section 75-7-605, the controlling law in this case, after the statute was raised to the court in a timely fashion.

Third, this Court should reverse the district court's grant of summary judgment to Tom on Jeff's counterclaim for reformation of Ira's Trust. The Uniform Trust Code expressly provides that a trust may be reformed to conform to the intention of the settlor

if it is proved that the original terms of the trust were affected by a mistake of fact or law. Ira's Partial Revocation demonstrated that Ira believed his Trust provided him with the authority to revoke the Trust, either in whole or in part. However, such a belief was, in fact, a mistake of law, as evidenced by the *Banks*' interpretation of the Trust language. Because Ira's Partial Revocation also clearly expressed his intention to completely disinherit Tom, the district court erred in refusing to reform the Trust to carry out Ira's expressed intentions.

Finally, this Court should reverse the district court's ruling that Tom is entitled to one-half of the personal property of Ira's estate because the court failed to properly consider evidence of Ira's intent in light of the ambiguities present in Ira's will. Because the evidence before the district court clearly established that Ira intended all of his tangible personal property to be transferred to his Trust, the district court erred in granting Tom partial summary judgment on this issue.

ARGUMENT

1. THE DISTRICT COURT ERRED IN GRANTING TOM'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON THE LANGUAGE OF *BANKS* WHEN THE FACTUAL CIRCUMSTANCES OF THIS CASE ARE CLEARLY DISTINGUISHABLE FROM *BANKS*

While the language of certain trust provisions at issue in *Banks v. Means*, 2002 UT 65, 52 P.3d 1190, is the same language contained in Ira's Trust, all of the remaining relevant facts are clearly distinguishable. Consequently, because the facts, circumstances, and conduct of the parties in the case at bar vary substantially from those presented in *Banks,* the district court erred in invalidating Ira's Partial Revocation based solely upon the language of *Banks*.

In interpreting the trust language in *Banks*, this Court held that Ms. Banks' purported amendment, which consisted solely of three replacement pages to be placed in the original trust document, was invalid because the amendment did not constitute a complete revocation. *Banks*, 2002 UT 65 at ¶¶ 5, 16. Relying on the *Banks* language, the district court in this case declared that the Partial Revocation is likewise invalid because it did not constitute a "complete revocation." However, in so holding, the district court failed to consider the distinguishing facts in this case that render the holding of *Banks* inapplicable and unjust.

In *Banks*, the settlor, Ms. Banks, executed a trust in 1992. 2002 UT 65 at ¶ 2. The trust's "Purposes" section clearly stated that the trust was established for the "primary benefit" of Ms. Banks during her lifetime and, thereafter, for her family, which was

defined as Ms. Banks' three children. *Id.* at ¶ 3. The trust also provided that, upon Ms. Banks' death, the proceeds of the trust would be divided among Ms. Banks' three children. *Id.* As in this case, the trust specifically reserved Ms. Banks' right to amend, modify, or revoke the trust in section 3.1, stating:

> 3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property.

Id. at ¶ 4.

The *Banks* trust also contained a section regarding the interests of beneficiaries that is identical to paragraph 3.2 of Ira's Trust. That section provided as follows:

> 3.2 Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity.

Id.

In August 1999, only two weeks before her death,[4] Ms. Banks executed an amendment to the trust, which consisted only of "three replacement pages inserted into

[4] As discussed in the appellate briefs in the *Banks* case, the circumstances surrounding the purported amendment to Ms. Banks' trust were suspect, to say the least. Ms. Banks executed the trust, which designated each of her three children as beneficiaries, in 1992. (Reply [sic] Brief of Appellees at 5-6.) Ms. Banks never had a falling out with any of her

the trust document." *Id.* at ¶ 5. The amendment did not modify the purpose of the trust, as set forth in Article I, nor did it modify the definition of Ms. Banks' family as originally defined in the trust. *Id.* Instead, the amendment simply changed the beneficiary and the successor trustee provisions so that Ms. Banks' older sister, Ms. Means, would be the sole beneficiary and the successor trustee after Ms. Banks' death. *Id.*

After summary judgment was granted to the Banks' children, this Court was asked to determine the validity of the purported amendment to Ms. Banks' trust. Recognizing that, pursuant to the language of Ms. Banks' trust, "[r]evocation is ... a specific provision of the trust language and ***is not the same as an amendment or modification***," *id.* at ¶ 11 (emphasis added), this Court held that the "plain language" of section 3.2 provided that "the beneficiaries have 'vested interests' that continue until the interests are 'revoked or terminated.'" *Id.* at ¶ 12 (footnote omitted). The Court then declared that, "[t]hus, a

---

children, and, in fact, in February of 1999, Ms. Banks gave her original 1992 trust to one of her daughters "for safekeeping," with the instruction that she would "need those documents upon [Ms. Banks'] passing." (*Id.* at 7-8.)

In early 1999, Ms. Banks' health deteriorated such that Ms. Banks required extended hospitalization. (*Id.* at 7.) While Ms. Banks was in the hospital, Kevin Reeves, a "confidant" of Ms. Means, Ms. Banks' older sister, began making multiple calls to Ms. Banks' attorney for the purpose of amending Ms. Banks' trust to name Ms. Means as the sole beneficiary of the trust. (*Id.* at 5, 7-8, 10.) Ms. Banks' attorney eventually prepared three pages of "proposed changes" to Ms. Banks' trust, which he presented to Ms. Banks in the hospital approximately two weeks before her death. (*Id.* at 11, 13.) It was later discovered that Kevin Reeves was designated as the sole beneficiary of the estate of Ms. Means. (*Id.* at 13-14.)

complete revocation was required to divest the beneficiaries of their vested interests." [5] *Id.*

Ultimately, this Court held that the three page "amendment" to the trust was not sufficient to divest Ms. Banks' children of their interest under section 3.2, "which provide[d] that beneficiary interests are only subject to divestiture via a revocation of the trust." *Id.* at ¶ 15. In support of its holding, this Court noted that, if the "amendment" were to be given effect, it would "render some language null and void, and contravene the stated purpose of the [trust]." *Id.* at ¶ 15 n.5. The Court, therefore, affirmed the district court's grant of summary judgment to the Banks children.

Although Ira's Trust originally contained the same language as found in sections 3.1 and 3.2 of Ms. Banks' trust,[6] that is the only similarity between the two cases. Ira executed his Partial Revocation in 2003, 4 ½ years prior to his death, and there is no evidence even suggesting that Ira was persuaded or compelled in any way by anyone to sign the Partial Revocation. (R.364, 529.) To the contrary, the evidence in this case establishes that Ira clearly intended to disinherit Tom by executing the Partial Revocation. (R.361-62.) Indeed, Ira reaffirmed his intent to disinherit Tom in 2007, over

---

[5] Given the Court's ruling that a revocation was not the same as an amendment, this Court should not deem controlling the statement in *Banks* that a "complete revocation" is required by section 3.2 to divest a beneficiary of an interest in the trust. Indeed, because the determination in *Banks* simply required the Court to determine that a three page ***amendment*** was insufficient to divest a beneficiary's interest under section 3.2's requirement that the trust be revoked, the statement regarding a "complete revocation" was not an issue "essential or necessary for the determination of the question involved" and, therefore, is not "authoritative or binding upon the court in the case at bar." *Salt Lake City v. Sutter*, 216 P. 234, 237 (Utah 1923), *superseded by statute on other grounds.*

[6] Ira's Trust was prepared by the same attorney that prepared Ms. Banks' trust.

four years after signing the Partial Revocation and three months before his death, when he prepared and signed a letter in which he detailed the many disputes he had had with Tom, including disputes which led him to believe that Tom had attempted to steal his money. (R.486.)

More importantly, however, unlike in *Banks*, Ira did not execute "amendment" pages which simply attempted to replace original pages of his Trust with "amended" pages, while leaving the purpose of the Trust and other provisions unchanged. Rather, Ira executed a Partial Revocation, in which he specifically revoked certain provisions of his Trust, including the stated purpose of the Trust, the definition of Ira's family, and the beneficiary and trustee provisions. (R.360-66.) Additionally, unlike in *Banks*, Ira revoked paragraph 3.2 in its entirety. In so doing, Ira stated as follows:

> Grantor [Ira] interprets the phrase "until this Trust is revoked" found in paragraph 3.2 to mean "revocation ... of this Trust ... in whole or in part" (paragraph 3.1), rather than "revocation of this instrument in its entirety" (paragraph 3.1), noting that the latter phrase is used to define the specific and narrow circumstance and time as to when the Trustees are to deliver all trust property to the Undersigned, thus indicating that the word "revoked" found in paragraph 3.2 in fact means "revoked in whole or in part."

(R.360.)

After revoking these provisions, Ira also caused new provisions to be inserted into his Trust to replace those sections he had revoked. Ira's insertions clearly and unambiguously established that Ira intended to divest Tom of all interest in the Trust. Indeed, in the amended "Purposes" section of his Trust, Ira expressly declared that

> The Undersigned [Ira] has in mind but makes no provision herein for Thomas W. Warne, or his issue, or any other individual not specifically referred to in the Agreement by name or class, whether an heir or not.

> Notwithstanding anything to the contrary in this Agreement, said individuals shall not be deemed "Beneficiaries" as those terms are defined in the Trust Agreement or in this Amendment, and shall not be entitled to receipt of any Trust assets. This pretermission is intentional and binding.

(R.361-62.)

Thus, unlike in *Banks*, after learning that the Utah Supreme Court had interpreted language in his Trust in a manner inconsistent with his intent, Ira took affirmative steps to clarify his intent and to revoke and modify the governing provisions of his Trust to conform to his original intent that he be allowed to revoke any provision of the Trust, either in whole or in part, at any point during his lifetime. (R. 360.) Given that "the primary object of a court, in construing the provisions of a trust, is to carry out the intent of the trustor or trustors," *In re Gerber*, 652 P.2d 937, 939 (Utah 1982), the district court erred in disregarding Ira's stated intentions and his revisions to the governing provisions of his Trust.

2. THE DISTRICT COURT ERRED IN FAILING TO APPLY SECTION 75-7-605

As discussed more fully below, Section 75-7-605 is the controlling law governing the question of whether the Partial Revocation should be given effect. Because the district court did not apply the provisions of Section 75-7-605, either in its Memorandum Decision or in its review of Jeff's Motion to Alter or Amend Judgment, the district court erred in concluding that Tom was entitled to judgment as a matter of law. The district court's judgment should therefore be reversed.

a. The District Court Erred in Holding that the Partial Revocation Is Invalid for Failure to Comply with *Banks v. Means* when *Banks* Has Been Superseded By Statute

Because *Banks* has been superseded by the adoption of Section 75-7-605 of the Utah Code, the district court erred when it failed to apply the statute and instead invalidated the Partial Revocation based solely upon the language of *Banks*. In *Banks*, this Court was asked to resolve the validity of a purported amendment to Ms. Banks' trust. Recognizing the common law rule that "a settlor has the power to modify or revoke a trust only if and to the extent that such power is explicitly reserved by the terms of the trust," *Banks*, 2002 UT 65 at ¶ 9, the *Banks* Court began its analysis "with an examination of the original trust language." *Id.*

The *Banks* Court first determined that, pursuant to the language of the trust at issue, the settlor had reserved "the right to amend, modify or revoke" the trust "in whole or in part." *Id.* at ¶ 10. However, the *Banks* Court then held that such power was expressly limited by the language of section 3.2 of that trust, which provided that "[t]he interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this [t]rust is revoked or terminated other than by death." *Id.* at ¶ 12. Because the trust stated that the beneficiaries had "'vested interests' that continue until the interests are 'revoked or terminated,'" the Court interpreted the language of the trust as requiring "a complete revocation ... to divest the beneficiaries of their vested interests." *Id.* The Court then held that Ms. Banks' purported "amendment" was invalid because it failed to comply with the terms of the trust. *Id.* at ¶ 16.

Two years after the *Banks* opinion was issued, the Utah Legislature enacted Section 75-7-605 of the Utah Uniform Trust Code. In contrast to the holding in *Banks*, which required strict compliance with the terms of the trust, the Uniform Trust Code provides that an amendment or revocation to a trust is effective despite the settlor's failure to strictly comply with the terms of his or her trust. Indeed, Section 75-7-605 provides that a settlor may effectively revoke or amend his or her trust

> (a) by ***substantially complying*** with a method provided in the terms of the trust; ***or***
> (b) if the terms of the trust do not provide a method or ***the method provided in the terms is not expressly made exclusive***, by:
> (i) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
> (ii) any other method ***manifesting clear and convincing evidence of the settlor's intent.***

Utah Code Ann. § 75-7-605(3) (2009) (emphasis added).

The Utah Uniform Probate Code, of which Utah's Trust Code forms a part, mandates that the Code shall be "liberally construed and applied to promote its underlying purposes and policies," which include "[t]o discover and make effective the intent of a decedent in distribution of his property." *Id.* § 75-1-102(1), (2)(b) (2009). To this end, the provisions of the Uniform Trust Code, including Section 75-7-605(3), apply to "***all trusts created before***, on, or after ***July 1, 2004***," as well as "***all judicial proceedings*** concerning trusts ***commenced on or after July 1, 2004***." *Id.* § 75-7-1103(1)(a), (b) (2009) (emphasis added).

Despite the provisions of Section 75-7-605, which unquestionably should have been applied to Ira's Trust and Partial Revocation, the district court did not apply that

section's "substantial compliance" standard to determine the validity of Ira's Partial Revocation. Rather, the district court applied the strict compliance standard set forth in *Banks*, holding, "this [c]ourt cannot override *Banks* by interpreting the Ira Trust language as requiring merely a partial revocation when the Utah Supreme Court has clearly indicated that a complete revocation and a return of property is required." (R.520.)

Had the district court properly applied the controlling law in this case, it would have been required to consider and determine an issue of fact of whether Ira had substantially complied with the terms of his Trust before it could effectively rule on Tom's motion for partial summary judgment. Such a determination would have required the district court to consider whether "the deviation from the ... requirements [would] ... in any real substantial measure ... frustrate[] the purpose" of the Trust. *Joseph A. v. New Mexico Dept. of Human Servs.*, 69 F.3d 1081, 1085, 1086 (10th Cir. 1995) (internal quotations omitted) (third and fourth alterations in original). Despite its failure to perform such an analysis to determine whether Ira had substantially complied with the terms of his Trust, the district court nonetheless ruled that Tom was entitled to judgment as a matter of law. In so doing, the district court erred.

Applying the controlling law in this case, it is clear Ira substantially complied with the provisions of his Trust when he executed his Partial Revocation in 2003. First, there can be no question that the purpose of Ira's Trust was to effectuate the distribution of Ira's property after his death in accordance with his expressed desires, intentions, and instructions. Thus, the question becomes did execution of the Partial Revocation, as opposed to a complete revocation, frustrate that purpose. The answer is undisputedly

"No." Ira expressly and unambiguously stated his intention and desire to disinherit Tom, and the Partial Revocation modified the Trust to accomplish Ira's intended distribution. Ira's execution of the Partial Revocation did not frustrate but rather furthered the purpose of his Trust.[7] Accordingly, this Court should hold that the Utah Trust Code applies, that *Banks* is not controlling, and that Ira substantially complied with the terms of his Trust when he fully executed the Partial Revocation, in which he clearly and unequivocally set forth his intention to disinherit Tom. Because the district court failed to apply Section 75-7-605, the controlling law in this case, its ruling that Tom is entitled to summary judgment as a matter of law should be reversed.

b. The District Court Erred in Denying Jeff's Rule 59(e) Motion to Alter or Amend

In addition to failing to apply the controlling law when initially determining the validity of the Partial Revocation, the district court also erred when it failed to remedy its error as requested in Jeff's Motion to Alter or Amend Judgment. Because the district court's Memorandum Decision did not address the application of Section 75-7-605 despite argument raised before the district court during the hearing, Jeff moved the district court to alter or amend its judgment to specifically address the impact that statute had on the issue before the court. In that motion, Jeff again argued that Section 75-7-605 controlled the district court's determination of the enforceability of the Partial Revocation. (R.530-33.) The district court refused to alter its judgment, however, and

[7] It should be noted that, other than his reliance on the language in the *Banks* opinion, Tom has not advanced any argument or rationale for the necessity of a "complete revocation."

instead held that the applicability of Section 75-7-605 had not been properly raised. (R.552B.) In so holding, the district court erred because application of the statute had been properly and timely raised before the court.

An issue is properly raised and before the district court and, therefore, preserved for appellate review when the district court is "offered an opportunity to rule on [the] issue." *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998). The test for determining whether a district court has been afforded "an opportunity to rule" on an issue consists of three parts: "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." *Id.* (internal quotations omitted).

With respect to the first requirement, *i.e.*, raised in a timely fashion, this Court has held that an issue is raised in a timely fashion if it was presented to the district court "prior to the ruling on the motion" at issue. *Franklin Financial v. New Empire Dev. Co.*, 659 P.2d 1040, 1045 (Utah 1983); *accord Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1054 n.1 (7th Cir. 1988) (holding that issue raised in supplemental brief "filed after the hearing but before the district court rendered its decision" was "sufficiently presented to the district court for purposes of preserving the argument for appellate review"). Moreover, an issue is "sufficiently raised" if it is "raised to a level of consciousness such that the trial judge can consider it." *Groberg v. Housing Opportunities, Inc.*, 2003 UT App 67, ¶ 19, 68 P.3d 1015 (internal quotations omitted).

In this case, the district court was properly afforded the opportunity to rule on the issue of whether Section 75-7-605 applied. Indeed, Jeff's counsel not only raised the

statute during oral argument on Tom's motion for partial summary judgment, he also provided the district court and counsel with a copy of the statute. (R.560:9, 25.) In arguing that Section 75-7-605 changed or modified the ruling of *Banks*, Jeff's counsel stated as follows:

> I think the language of all the cases, if you will, says that you have to look at the trust document, interpret what the trust document says, but 605 is very clear that the settlor may revoke or amend an irrevocable trust by substantially complying with the method provided in the terms of the trust or any other method that manifests clear and convincing evidence of the settlor's intent.

(R.560:25, 26.) Clearly, Jeff's argument, which cited specifically to the controlling statute, raised the applicability of Section 75-7-605 to a level of consciousness such that the district court could and should have considered it. Moreover, this issue raised at oral argument was timely. Thus, the district court erred in failing to apply Section 75-7-605 and in even failing to address the statute in its Memorandum Decision.

In denying Jeff's Motion to Alter or Amend, Judge Maughan, who did not hear the earlier argument, stated that the application of Section 75-7-605 was not properly before the district court because Jeff failed to address the statute in his written memorandum opposing Tom's motion for partial summary judgment. However, such a ruling is erroneous. Utah's courts have recognized that an issue may be raised orally at a hearing before the district court. Indeed, in *Franklin Financial*, this Court recognized that it is possible to raise an argument orally at a hearing on a motion for summary judgment, holding that the party asserting that the issue had been preserved is required to provide a complete record to establish that the issue was in fact raised during the hearing. 659 P.2d

at 1045; *see also In re Estate of Rison*, 933 P.2d 1015, 1018 n.5 (Utah Ct. App. 1997) ("In their reply brief, though, the Morrisons contend they did preserve this argument by raising it during oral argument on the motion. However, we have no record that there was oral argument on that particular motion. And, even if there was oral argument, we have no transcript of the hearing. Thus, we have no record that this argument was preserved."). In the instant case, the argument was raised and argued at the oral argument hearing before the district court, and the record transcript of that argument has been provided to this Court. (R.560.) (*See* Addendum D.)

Courts throughout the country have similarly held that an issue is preserved if it is raised orally at a hearing before the district court. *See, e.g., Fraternal Order of Police v. United States*, 173 F.3d 898, 902 (D.C. Cir. 1999) (holding that the plaintiffs' "oral argument [at the combined summary judgment/preliminary injunction hearing] on the felon-misdemeanant distinction was enough to satisfy the general requirement that an issue on appeal be raised in the trial court."); *Hilb, Rogal & Hamilton Co. of Ariz., Inc. v. McKinney*, 946 P.2d 464, 468 n.5 (Ariz. Ct. App. 1997) (holding that the defendant "sufficiently preserved" an issue for appellate review because his "attorney referred to the causation issue at oral argument on the motions for summary judgment"); *McGinley v. Bank of America*, 109 P.3d 1146, 1157 (Kan. 2005) ("The record on appeal reveals McGinley argued this issue, without objection by the Bank, at the hearing on the Bank's motion for summary judgment. Accordingly, it is sufficiently raised for our consideration on appeal."); *Black v. Powers*, 628 S.E.2d 546, 553 n.7 (Va. Ct. App. 2006) (holding that the issue was "sufficiently preserved for purposes of appeal" when the

plaintiff "clearly argued that the law of the Virgin Islands should apply [during oral arguments before the trial court]").

Because Jeff argued to the district court that the more recently enacted Section 75-7-605 applied to the determination of the enforceability of the Partial Revocation at such a time and in such a manner that the court was afforded an opportunity to rule on the issue, the district court not only erred in refusing to address the issue properly raised before the court, but it also acted in a manner contrary to public policy. *See Thurston v. Box Elder County*, 835 P.2d 165, 168 n.3 (Utah 1992) (holding that, although the "parties and the district court did not address the effect of [Section 17-33-5]," the Court will "consider the statute's effect on this case sua sponte because it is controlling and it would be contrary to public policy to decline to do so."). Consequently, this Court should reverse the district court's denial of Jeff's Motion to Alter or Amend and hold that the court must consider and apply the controlling statutory law in this case.

3. THE DISTRICT COURT ERRED IN REFUSING TO REFORM IRA'S TRUST WHEN IRA'S INTENT THAT HE BE ALLOWED TO REVOKE THE TRUST IN PART WAS SHOWN BY CLEAR AND CONVINCING EVIDENCE

The district court also erred when it refused to reform the Trust pursuant to Section 75-7-415. That section provides as follows:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Utah Code Ann. § 75-7-415. The Uniform Law Comments to Section 75-7-415 explain that, "[i]n determining the settlor's original intent, the court may consider evidence

relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text." Utah Code Ann. § 75-7-415 cmt. Additionally, the comments note that, "[b]ecause reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential." *Id.*

Despite Jeff's counterclaim for reformation of the Trust pursuant to Section 75-7-415 to conform to Ira's stated intentions, the district court refused to apply Section 75-7-415 and instead granted summary judgment in favor of Tom. In support of its ruling, the district court opined that

> [t]his is not a case where the settlor was mistaken about the law or was unclear about how to accomplish his purposes. Instead, being fully aware of *Banks*, Ira and his counsel simply sought to accomplish an end run around this opinion. Under these unusual circumstances, the Court is unable to allow reformation where the purpose is clearly to circumvent existing case law.

(R.520.)

However, in so reasoning, the district court failed to consider that the Partial Revocation evidenced that Ira's original Trust was in fact affected by a mistake of law. As clearly shown in the Partial Revocation, Ira intended the phrase found in paragraph 3.2 "until this Trust is revoked" to mean revocation in whole or in part. (R.360.) Thus, Ira did not intend the language of paragraph 3.2 to convey a presently vested interest to Tom that would restrict Ira's right to subsequently revoke the Trust in part. As recognized by this Court, the inclusion of language similar to that found in paragraph 3.2 in trusts drafted in Utah appeared to be the result of the Court's prior statement that "a

trust is invalid unless the beneficiary's interest vests during the settlor's lifetime." *Hoggan v. Hoggan*, 2007 UT 78, ¶ 11 n.2, 169 P.3d 750. Unfortunately, however, use of language similar to that of paragraph 3.2 has had "the potential to produce results not within the contemplation of the drafters of trusts or their clients" because "the insertion of language proclaiming that the beneficiaries have a 'present interest' simply contradicts the operative terms of the trust." *Id.*

Given that this Court has recognized that the phrase "vested interest subject to divestment" is essentially "an oxymoron," *id.*, it is apparent that the inclusion of such language by Ira's counsel in the Trust was due to a mistake of law. Consequently, viewing all facts and inferences in favor of Jeff, the district court should have found that a disputed issue of fact exists as to whether Ira's mistake of law affected the Trust. Because it failed to do so and instead entered judgment in favor of Tom on Jeff's claim of reformation, the district court should be reversed.

4. THE DISTRICT COURT ERRED IN RULING THAT TOM WAS ENTITLED TO ONE-HALF OF THE PERSONAL PROPERTY OF IRA'S ESTATE WHEN THE PROVISIONS OF THE WILL WERE AMBIGUOUS

Finally, the district court erred in ruling that Tom was entitled to judgment as a matter of law on his claim under Ira's will because the provisions of the will are ambiguous. In ruling that Tom was entitled to one-half of the personal property included in Ira's estate, the district court stated only that the Codicil executed by Ira at the time he executed the Partial Revocation "did not change the distribution provisions of the Will." (R.521.) The district court never addressed Jeff's argument that the distribution provisions of the will were ambiguous. (R.560:20.) Because such an issue should have

been resolved prior to ruling on Tom's motion for partial summary judgment, *see Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 14, 48 P.3d 918 (holding that "a motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended"), the district court's ruling should be reversed.

As stated in *In re Estate of Ashton*, 804 P.2d 540 (Utah Ct. App. 1990),

> [i]n construing a will, a court must look to the testator's intent as expressed in the will. The intent may be ascertained not alone from the provision itself, but from a scrutiny of the entire instrument of which it is a part, and in light of the conditions and circumstances in which the instrument came into existence. Thus, extrinsic evidence may be used to ascertain what the testator intended.

Id. at 542 (internal quotations and citations omitted).

The pertinent distribution provisions of Ira's will provide as follows:

> 2.1(a) Tangible Personal Property—Gift by Written Statement. I give my tangible personal property not otherwise specifically devised in this Will, except any such property which, at the time of my death, is used in a trade or business, in accordance with a written statement signed by me or in my handwriting which I intend to leave at my death.
>
> 2.1(b) Contingent Gift. I give all of my tangible personal property not effectively disposed of by such written statement, or otherwise specifically devised in this Will, except any such property which, at the time of my death, is used in a trade or business, ... to my issue who survive me, by representation, to be divided among them as they shall agree ....
>
> 2.2 Pour-Over to Family Protection Trust. On the 15th day of July, 1991, I executed a written Trust Agreement entitled the IRA B. WARNE Family Protection Trust. ***That Trust and this Will form part of an integrated plan to provide for the disposition of my estate upon my death and both instruments should be construed and administered accordingly.*** I hereby give, devise and bequeath all of my property, not effectively disposed of by the above described written statement or by other provisions of this Will, whether real, personal, or mixed, and wherever situate to the Trustee of

> such Trust, in trust, to be administered and distributed pursuant to the provisions of such Trust including any amendments made subsequent to the execution of this Will that are in effect at the time of my death.

(R.354 (emphasis added).) (A copy of the Last Will and Testament of Ira B. Warne is attached hereto as Addendum J.)

Thus, Section 2.1(b), by its plain language, provides that, in the event Ira did not execute a written statement regarding the disposition of his personal property, the personal property should be divided among Ira's children ***if*** the property is not "otherwise specifically devised in this Will." (*Id.*) Similarly, in Section 2.2, Ira specifically devises to the Trust all of Ira's personal property ***if*** "not effectively disposed of by the above described written statement or by other provisions of this Will." (*Id.*)

Given that both Section 2.1(b) and 2.2 are contingent upon the fact that the personal property is not otherwise disposed of by another portion of the will, the provisions create a circularity that cannot be resolved merely by reference to the plain language of the will. Moreover, because Ira expressly stated in his will that he intended that his Trust and his will "form part of an integrated plan to provide for the disposition of [his] estate upon [his] death and both instruments should be construed and administered accordingly," the district court should have reviewed Ira's Trust to properly interpret Ira's intent with respect to the distribution of his personal property.

Had it done so, it would have discovered that Ira transferred all of his property, including all of his personal property, to the Trust at the time of its creation. (R.349, 351.) Indeed, in Schedule A to the Trust, Ira transferred, sold, assigned, and conveyed "[a]ny and all personal property ***now owned and hereafter acquired*** by the Undersigned

[Ira]" with "all right, title, interest, and obligations pertaining thereto, to the Trustees, subject to the terms and conditions of the IRA B. WARNE Family Living Trust, dated the 15th day of July, 1991." (R.349 (emphasis added).) Such property specifically included "personal and household articles." (R.351.) Clearly, this Schedule to Ira's Trust, which must be construed in accordance with the provisions of Ira's will, demonstrates that Ira intended to have all of his property, including his tangible personal property either owned at the time he executed his Trust or acquired thereafter, devised to the Trust and to be administered under the provisions of the Trust. Because the district court refused to consider this evidence and instead held that Tom was entitled to one-half of the personal property of Ira's estate pursuant to Section 2.1(b), the district court erred as a matter of law.

CONCLUSION

The question before this Court is whether Ira's intentions regarding the distribution of his property, which are unambiguous and are unequivocally stated, should be disregarded because his counsel failed to strictly comply with the provisions of the Trust as interpreted by the *Banks* Court. The answer is clearly "No." The Uniform Trust Code expressly provides that the law in Utah should be liberally construed to effectuate the intent of a decedent with respect to the distribution of his property. Because Ira specifically expressed his intent to disinherit Tom, this Court should hold that Ira's Partial Revocation is valid and should be given effect.

DATED this 7th day of June, 2010.

SMITH HARTVIGSEN, PLLC

Clark R. Nielsen
Kathryn J. Steffey
Attorneys for Defendant/Appellant Jeffrey Warne

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010, I caused to be served, via U.S. first class mail, postage prepaid, two true and correct copies of the **BRIEF OF APPELLANT JEFFREY WARNE** addressed as follows:

Edward R. Munson
Ryan M. Harris
JONES, WALDO HOLBROOK & MCDONOUGH
170 South Main Street #1500
Salt Lake City, Utah 84101
Attorneys for Plaintiff/Appellee Thomas Warne

Kathrin Stalley

ADDENDA

(A) Utah Code Ann. § 75-7-415 (2009);

(B) Utah Code Ann. § 75-7-605 (2009);

(C) Utah R. Civ. P. 59;

(D) Excerpts from October 26, 2009 Oral Argument (pages 25-27, 32-33);

(E) Third District Court Memorandum Decision, dated November 18, 2009;

(F) Third District Court Ruling and Order on Rule 54(b) Certification, dated January 12, 2010;

(G) Ira B. Warne Family Protection Trust;

(H) Partial Revocation of and Amendment to the Ira B. Warne Family Protection Trust;

(I) Codicil to the Last Will and Testament of Ira B. Warne; and

(J) Last Will and Testament of Ira B. Warne.

Tab A

Utah Code
Title 75 Utah Uniform Probate Code
Chapter 7 Utah Uniform Trust Code
Section 415 Reformation to correct mistakes.

75-7-415. Reformation to correct mistakes.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Enacted by Chapter 89, 2004 General Session
Download Code Section Zipped WordPerfect 75_07_041500.ZIP 1,634 Bytes

<< Previous Section (75-7-414) Next Section (75-7-416) >>

Tab B

Utah Code
Title 75 Utah Uniform Probate Code
Chapter 7 Utah Uniform Trust Code
Section 605 Revocation or amendment of revocable trust.

75-7-605. Revocation or amendment of revocable trust.

(1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This Subsection (1) does not apply to a trust created under an instrument executed before May 1, 2004.

(2) If a revocable trust is created or funded by more than one settlor:

(a) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(b) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.

(3) The settlor may revoke or amend a revocable trust:

(a) by substantially complying with a method provided in the terms of the trust; or

(b) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(i) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(ii) any other method manifesting clear and convincing evidence of the settlor's intent.

(4) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(5) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

(6) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.

(7) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

Enacted by Chapter 89, 2004 General Session
Download Code Section Zipped WordPerfect 75_07_060500.ZIP 2,587 Bytes

<< Previous Section (75-7-604) Next Section (75-7-606) >>

Tab C

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Tab D

080907826

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THOMAS WARNE	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. 080907826
	)	
KEFFREY WARNE	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE ROBERT FAUST

THIRD DISTRICT COURT

450 S. STATE STREET

SALT LAKE CITY, UTAH 84111

MOTION FOR SUMMARY JUDGMENT

ELECTRONICALLY RECORDED ON

OCTOBER 26, 2009

FILED DISTRICT COURT
Third Judicial District

MAR 0 3 2010

SALT LAKE COUNTY

By _____ Deputy Clerk

Reported by: Colleen C. Southwick, RPR/CSR

ORIGINAL

and redo -- I mean, there might be a variety of reasons for that, but I don't think that that's necessarily even relevant to the Court now in the context of summary judgment. Other questions? Thank you.

My co-counsel reminds me, your Honor, that I haven't talked about Section 605 and 606. They are there in the book.

THE COURT: I did have another question. That reminds me before you go tell me how you think the new Uniform Trust Code changed or modifies the ruling that came down in Banks.

MR. NIELSEN: 605 and 606, your Honor.

THE COURT: (Inaudible.)

MR. NIELSEN: Yeah, that's what they say. And they say that under the Uniform Trust Code the beneficiary does not have a vested interest in the property, at least unless the trust document says otherwise, at least that's as I read it.

THE COURT: But this trust document in issue did say they had a vested interest, right?

MR. NIELSEN: It did. And he said I intended my language to allow me to do that and to revoke that even in part.

THE COURT: Yeah, that's assuming that that provision is considered valid.

MR. NIELSEN: That's -- that would be a separate consideration.

THE COURT: But that aside you're not saying that without this partial revocation there is no -- let me back up, vesting simply because of these 606 and 605 provisions because we do have a specific indication they should vest and that would be --

MR. NIELSEN: I think --

THE COURT: Right?

MR. NIELSEN: Yeah, I think the language of all the cases, if you will, says that you have to look at the trust document, interpret what the trust document says, but 605 is very clear that the settlor may revoke or amend an irrevocable trust by substantially complying with the method provided in the terms of the trust or any other method that manifests clear and convincing evidence of the settlor's intent. And in 606 it talks about the powers of withdrawal, but what's important. I think here when it talks about powers of withdrawal, the holder of a power of withdrawal has the rights of a settlor over a revocable trust under this section to the extent the property is subject to the power.

And I think I don't know whether we got the comment in your Honor's copy, but the comment I think to 606 is very clear. It says this section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor. This section thus recognizes that the settlor of a revocable trust

is in control of the trust and should have the right to enforce the trust. And then it goes on to say that the rights of the beneficors such as they are held by the beneficiaries, but the Subsection A of 606 says that the rights to the settlor of a revocable trust remains with the settlor while he has capacity. And in this case there's no question at least for the purposes of summary judgment that he did not have capacity.

THE COURT: Thank you. Mr. Munsun.

MR. MUNSUN: Thank you, your Honor. I just would note that this is a completely new argument. It doesn't appear in their brief with regard to Section 605 and 606. And in the two minutes I've had to look at it, it seems to me it doesn't apply anyway, but I'll get to that at the end.

The part of the problem with their argument with regard to the other code section, the section that allows the Court to modify provisions of a trust, is that their own counterclaim says that they want an order reforming the terms of the Ira B. Warne Family Protection Trust to conform with the clear desires of Ira B. Warne. They've told us what the desires of Ira B. Warne were in 2003. They haven't said anything about what his desires were in 1991 when he changed the trust. There would have had to have been a mistake of fact or law in 1991 when he signed that trust, they would have to have clear and convincing evidence of that to win. They have to have at least some evidence of that it seems to me to get

initial trust that limited their ability to make that change? And the language is identical in both cases. There's no way around that by changing -- by slightly modifying it to call it instead of an amendment to call it a partial revocation or whatever. The case says it's got to be a complete revocation.

Now, I'd like to talk if I might on -- oh, and also counsel went through a long recitation of facts about why Ira wanted to disinherit my client. All of that -- you know, there's certainly disputes as to all of that, but for purposes of this motion we agree it's all true. The problem is is that it's completely irrelevant. We don't dispute he wanted to do it. And why he wanted to do it doesn't matter. The fact is he didn't do it the way he forced himself to do it.

I would like to talk briefly about these statutes. And, again, this is the first time I've heard that they were going to be applied here, but Subparagraph 1 of 605 says at least as to that Subparagraph it doesn't apply to any trust created before May 1, 2004. This clearly is one of those. And the -- and it does -- again, it's sort of on the fly here, your Honor, but it says if the terms of the trust do not provide a method or method provided in the terms not expressly made exclusive, that is 3-b, well, I think it does make -- it provides an exclusive way of revoking or modifying this trust. This is -- I'm reading 605-3-b -- and in a very exclusive way of doing it it said you had to revoke this trust or terminate

it other than by death.

So, again, I don't think that applies. 606 I don't think even has anything to do with this. It's a power to withdraw by the settlor so the settlor -- we're not talking about whether or not Ira took something out of the trust. Presumably if he had taken everything out of the trust and put it in the new trust I wouldn't be standing here today because he would have done what his trust required him to do. He didn't do that. He tried to skip a couple of steps. Banks versus Means says you can't do that. And so, your Honor, I think we should apply Banks versus Means to this situation. It clearly applies and we should receive summary judgment on all three issues. Thank you, your Honor.

MR. NIELSEN: Your Honor, if you'd allow me just two comments. I admit that I took too much time over in family relations and with the commissioners and I guess they let everybody talk, but I just wanted to point out quickly the difference between this case and the example that counsel gives is that it's his television set. It's his television set. And if I walk into Sears with my television set and walk out with my television set, I guess I have the right to walk out with it.

Secondly, I think I just need to remind the Court the purpose of the code is to discover and put into effect the intent of the decedent. I think that's what the Court needs to

Tab E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THOMAS WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust,	:	MEMORANDUM DECISION
	:	CASE NO. 080907826
Plaintiff,	:	
vs.	:	
JEFFREY WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust,	:	
	:	
Defendant.	:	

This matter came before the Court for hearing on October 26, 2009, in connection with the Plaintiff's Motion for Partial Summary Judgment. At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsel's oral argument. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

The Plaintiff's Motion seeks Partial Summary Judgment on the Plaintiff's Second Amended Complaint and the Defendant's Counterclaim. At issue is a May 9, 2003, Partial Revocation of and Amendment ("Partial Revocation") to the Ira B. Warne Family Protection Trust ("Ira Trust") which was executed by Ira B. Warne ("Ira"). The Plaintiff seeks, in

part, a declaration that the Partial Revocation is invalid because it fails to follow Banks v. Means, 52 P.3d 1190 (Utah 2002). The Defendant's Counterclaim, in turn, seeks a declaration that the Partial Revocation resulted in the Defendant being the sole trustee and beneficiary of the Ira Trust. The Second Cause of Action of the Counterclaim seeks a reformation of the Ira Trust to comport with Ira's intent.

The first issue that the Court addresses is the validity of the Partial Revocation. Under Section 3.2 of the Ira Trust, the interests of the beneficiaries of that Trust were "vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death." In Banks, the Utah Supreme Court addressed identical language as barring the complete divestiture of a beneficiary's interest absent revocation or termination of the trust, with the assets being returned to the settlor. Id. at 1192. The amendment in that case was deemed invalid because it was not a complete revocation and the assets had not been returned to the settlor. Id.

Notably, since the Partial Revocation specifically refers to Banks, it is apparent that the drafters were aware that a full revocation was required. Nevertheless, in an apparent attempt to "preempt" Banks, the drafters proceeded with a partial revocation. The Defendant now maintains that Banks "went too far" and that a partial revocation is all that is required by the language of the Ira Trust.

After considering the foregoing, the Court determines that the Partial Revocation is invalid. The drafters' (and, as a corollary, the settlor's) attempt to interpret the Ira Trust language, which is identical to Banks, in a way that is contradictory to Banks is ineffective. Moreover, this Court cannot override Banks by interpreting the Ira Trust language as requiring merely a partial revocation when the Utah Supreme Court has clearly indicated that a complete revocation and a return of property is required. Accordingly, the Plaintiff's Motion for Partial Summary Judgment seeking to declare the Partial Revocation as invalid is granted.

The Defendant suggests that this Court should reform the terms of the Ira Trust in such a way as to render the Partial Revocation valid. In making this argument, the Defendant is again seeking to preempt the implications of Banks. The Court is not persuaded that there is any legal basis to reform the Ira Trust such that reformation would be appropriate. This is not a case where the settlor was mistaken about the law or was unclear about how to accomplish his purposes. Instead, being fully aware of Banks, Ira and his counsel simply sought to accomplish an end run around this opinion. Under these unusual circumstances, the Court is unable to allow reformation where the purpose is clearly to circumvent existing case law.

Next, the Plaintiff has raised an issue concerning Ira's personal property. The Court agrees that Ira's Codicil amended Paragraph 3.1,

which designates his personal representative. The Codicil did not change the distribution provisions of the Will. The Court rules that the Plaintiff is entitled to one-half of the personal property included in Ira's estate.

Finally, the Defendant has not addressed the Plaintiff's arguments in regard to the Third Cause of Action of the Complaint. Accordingly, the Court grants Summary Judgment on the Third Cause of Action.

Based on the foregoing, the Court grants the Plaintiff's Motion for Partial Summary Judgment in the entirety. This Memorandum Decision will stand as the Order of the Court.

Dated this 18 day of November, 2009.

ROBERT P. FAUST
DISTRICT COURT JUDGE

SALT LAKE COUNTY SALT LAKE CITY STATE OF UTAH DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 18 day of November, 2009:

Edward R. Munson
Ryan M. Harris
Attorneys for Plaintiff
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101

J. Craig Smith
Clark R. Nielsen
Kathryn J. Steffey
Attorneys for Defendant
215 S. State Street, Suite 600
Salt Lake City, Utah 84111

BT

Tab F

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THOMAS WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust,	RULING AND ORDER ON RULE 54(b) CERTIFICATION
Plaintiff,	CASE NO. 080907826
vs.	
JEFFREY WARNE, individually and as Trustee of the Avis P. Warne Family Protection Trust and the Ira B. Warne Family Protection Trust,	
Defendant.	

The Court has before it a request for decision filed by the defendant seeking a ruling on his Motion to Alter or Amend Judgement or, in the Alternative, to Certify Ruling as Final Pursuant to Rule 54(b). Having reviewed the moving and responding Memoranda, the Court rules as stated herein.

The defendant's Motion effectively seeks the reconsideration of the prior Judge's ruling on the plaintiff's Motion for Partial Summary Judgment. That ruling was contained in a Memorandum Decision, dated November 18, 2009. The defendant now asserts that this ruling was based exclusively on the case of Banks v. Means, 52 P.3d 1190 (Utah 2002), and did not take into consideration the implications of Utah Code Ann., § 75-7-605(3). It appears that the defense counsel mentioned this Section at

the oral argument on the plaintiff's Motion, but did not expressly rely on this statute in the defendant's Opposition. Nevertheless, the defendant maintains that counsel preserved the issue by raising it at the hearing.

The plaintiff makes the valid point that defense counsel raising the statute for the first time at oral argument was procedurally improper. In essence, the defendant now seeks to bolster his opposition to the plaintiff's Motion for Partial Summary Judgment in the context of his present Motion, rather than during the original briefing and specifically in his Opposition. The case law that holds that the appellate courts are not required to address issues that were not briefed apply equally at the trial court level. Indeed, were it otherwise, parties could gain tactical advantage by purposely omitting arguments from their briefs and instead raising them for the first time during oral argument when the other side is ill-prepared to address them. Clearly, this runs counter to the purpose of motion pleading. Therefore, the Court is satisfied that this argument was not properly before the Court and need not have been considered by the Court. Further, the Court sees no legal or factual basis to otherwise alter or amend the Memorandum Decision.

Based on the foregoing, the defendant's Motion to Alter or Amend Judgment is denied. Since the plaintiff does not object to the Court certifying the Memorandum Decision as a final Judgment under Rule 54(b)

of the Utah Rules of Civil Procedure, the defendant's Motion to Certify is granted.

This Ruling and Order will stand as the Order of the Court. January 11, 2010

Dated this 12 day of January, 2010.

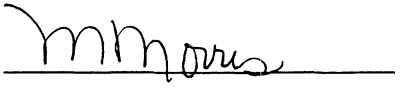
PAUL G. MAUGHAN
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling and Order on Rule 54(b) Certification, to the following, this 12 day of January, 2010:

Edward R. Munson
Ryan M. Harris
Attorneys for Plaintiff
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101

J. Craig Smith
Clark R. Nielsen
Kathryn J. Steffey
Attorneys for Defendant
215 S. State Street, Suite 600
Salt Lake City, Utah 84111



Tab G

THE
IRA B. WARNE
FAMILY PROTECTION TRUST

This Agreement is made and entered into this 15th day of July, 1991, by and between IRA B. WARNE (hereinafter referred to as the "Undersigned"), of SALT LAKE County, State of UTAH, and IRA B. WARNE and AVIS P. WARNE (hereinafter referred to as "Trustees").

The name of this trust shall be The IRA B. WARNE Family Protection Trust.

IRA B. WARNE hereby transfers and delivers to the Trustees (or their successor Trustees) the property listed in the attached Schedule "A" (which is incorporated herein), and the Trustees agree to hold said property and any other property which may be transferred to this trust by either inter vivos or testamentary transfer; and all said property shall be part of the trust and shall be held, administered and distributed by the Trustees according to the terms and conditions stated herein.

ARTICLE I

PURPOSES AND BIRTH DATES

1.1 Purpose of the Trust. This Trust is established for the primary benefit of the Undersigned during the Undersigned's lifetime, for the Undersigned's surviving spouse, and for the Undersigned's family thereafter.

1.2 Birthdates. The family of the Undersigned consists of, among others, the following:

Spouse of the Undersigned:
AVIS P. WARNE, March 29, 1915

Children of the Undersigned:
THOMAS W. WARNE, July 15, 1943
JEFFREY D. WARNE, August 30, 1957

The dates of birth above referred to may be relied upon by the Trustee for all purposes.

1.3 Community Property. If the Undersigned transfers property to this Trust which constitutes community property pursuant to the laws of any community property state having jurisdiction over such property, such property shall retain its character as community property while held hereunder until the earlier of the death of the Undersigned or the Undersigned's spouse. If the Undersigned removes such property from this Trust, such property shall continue to retain its character as community property. In addition, as to all community property which is transferred to this Trust, this Trust shall:

a) Remain revocable in whole or in part during the joint lives of the Undersigned and the Undersigned's spouse,

b) All said property that is transferred to this Trust shall remain community property and any withdrawals therefrom shall be community property of the Undersigned's spouse,

c) During the joint lives of the Undersigned and the Undersigned's spouse, the Trustees of this Trust shall have powers no more extensive than those possessed by the Undersigned or the Undersigned's spouse under the statutory provisions setting forth the rights and powers with regards to any community personal and real property generally; and

d) As to community property, this Trust shall be subject to amendment or alteration during the joint lives of the Undersigned and the Undersigned's spouse upon their joint consent.

ARTICLE II

DISPOSITION DURING THE LIFE OF THE UNDERSIGNED OR INCAPACITY

2.1 Income and Principal. During the lifetime of the Undersigned, such or all of the principal of the Trust Estate and any income which such principal shall generate shall be paid or delivered to such persons and in such manner from time to time as the Undersigned shall direct in writing or, in the absence of such direction, the Trustees shall pay or apply for the benefit of the Undersigned, such amounts to such persons as in the sole and absolute discretion of the Trustees is deemed necessary and proper for the health, support, maintenance and welfare of the Undersigned, in accordance with the Undersigned's accustomed manner of living at the date of this instrument. The Trustees shall exercise in a liberal manner the power to invade principal included in this paragraph 2.1, and the rights of the remainderman in the Trust shall be considered of secondary importance.

2.2 Guardianship. During physical or mental incapacitation, the Undersigned herein appoints the successor Trustees to succeed his or her place as a successor Trustee, guardian, or other legal capacity, whether appointed orally or in writing, and to supervise all matters in which the Undersigned had a right to act if the Undersigned had not become incapacitated.

ARTICLE III

AMENDMENT, REVOCATION AND ADDITIONS TO TRUST

3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee or Trustees. On the revocation of this instrument in its entirety, the Trustees shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property.

3.2 Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustees named herein in their fiduciary capacity.

3.3 Additions to Trust. It is understood that the Undersigned or any other person may grant, and the Trustees may receive as part of this Trust, additional real and personal property by assignment, transfer, deed, or other conveyance, or by any other means, testamentary or inter vivos, for inclusion in the Trust herein created. Any such property so received by the Trustees shall become part of the Marital Trust or Family Trust (hereafter described) to which said property is appointed and into which it is transferred and shall become subject to the terms of this Trust Agreement. If such property is not specifically appointed to either the Marital Trust or the Family Trust in particular, it shall be held, administered and distributed according to the terms of this entire Trust instrument.

3.4 After-Acquired Property. It is specifically the intention of the Undersigned that all real and personal properties now owned by the Undersigned, except for joint tenancy property, may be added to this Trust; provided further that all future real and personal properties acquired by the Undersigned may become a part of this Trust at the time acquired by the Undersigned.

ARTICLE IV

DISPOSITION AFTER DEATH OF THE UNDERSIGNED

4.1 Basic Trust Division, Trust Names, and Survivorship. At the death of the Undersigned, if the spouse of the Undersigned is then surviving, the Trustees shall divide the Trust Estate into two separate trusts, hereinafter designated as the "Marital Trust" and the "Family Trust", respectively, to be held, administered and distributed according to this Article IV as hereinafter stated. At the death of the Undersigned, if the spouse of the Undersigned has predeceased the Undersigned, then the trustees shall hold, administer and distribute the assets of this trust in accordance with Article V. In case of simultaneous death between the Undersigned and the Undersigned's spouse, whoever has the smallest estate shall be presumed to have survived the other in order to effect the lowest combined federal and state estate or inheritance taxes. The preceding sentence and Section 4.3 shall be interpreted to achieve the lowest possible combined state and federal estate taxes for the Undersigned and the Undersigned's spouse.

4.2 Debts and Taxes. All debts, expenses of last illness and funeral expenses, attorneys' fees and other costs incurred in administration of the estate of the Undersigned, and all federal, foreign estate, transfer, inheritance, and succession taxes payable by reason of the death of the Undersigned, may, in the sole discretion of the Trustees, be paid out of the Trust assets contributed to the Trust by the Undersigned. The Undersigned absolves his or her surviving spouse, if any, from any liability for any of said debts or expenses. The Trustees shall have the power to determine whether or not any or all of the secured debts shall be paid (including debts secured by property passing by joint tenancy) and thus exonerate particular properties from debt. Hence, the Trustees may pay secured debts, may obtain renewals or extensions of secured debts, may distribute property subject to such debts, and may do other acts which the Trustees deem appropriate and for the best interest of the Trust or the beneficiaries thereof. The Trustees shall have the discretion to require that the recipients of any assets included in the federal gross estate of the Undersigned pay

their proportionate share of any federal, state or other taxes. The aforementioned is subject to two exceptions: (i) none of the said hereinbefore described debts, expenses or federal, state, foreign estate or other taxes shall be borne by the surviving spouse of the Undersigned with respect to any such non probate assets or probate assets qualifying for the Marital deduction, but shall be charged to the Family Trust; and (ii) the proceeds received from any life insurance policies on the Undersigned's life or from qualified pension or profit sharing plans, and which may or may not be included in the gross estate of the Undersigned, shall not be liable for, or paid toward the debts, expenses, death taxes, or other charges against the estate of the Undersigned, if there are other assets available for such payment. Further, any proceeds received from insurance policies or retirement plans because of the death of the Undersigned and which are not included in the federal taxable estate of the Undersigned, shall become assets of the Family Trust and not the Marital Trust. The reason for this is to keep those assets from being taxed in the estate of the Undersigned. The Trustee is given authority to do whatever is necessary to keep those assets out of the federal taxable estate of the Undersigned.

4.3 Initial Corpus of the Marital Trust. If the Undersigned's spouse shall survive the Undersigned, the Trustee shall set aside, transfer and pay over to the Marital Trust all of the assets of this Trust. Notwithstanding anything contained in this paragraph, if a reduction of the property passing to the Marital Trust under this paragraph would not result in any increase in the federal estate tax upon the Undersigned's estate (after taking into account all credits allowable against such tax), said amount shall be reduced by the largest amount which will result in no increase in federal estate tax upon the Undersigned's estate, and such amount shall not pass under this paragraph but instead shall pass and be governed by the provisions of Article 4.5 of this Trust. In determining the amount of any such reduction, the final determination in the federal estate tax proceeding in the Undersigned's estate shall control, and there shall be taken into account all property passing or which shall have passed to or for the benefit of the Undersigned's spouse under this Trust, the Undersigned's Will or otherwise. Such reduction shall be deemed a dollar amount reduction, and the property passing as a result thereof under Article 4.5 of this Trust shall not participate in increases or decreases during the administration of the Undersigned's estate. To the extent possible, assets with respect to which the marital reduction is not allowable for purposes of federal estate tax on the Undersigned's estate, or with respect to which a credit for foreign death taxes is allowable for such purposes, shall be allocated to the property passing to the Trust created under Article 4.5 of this Trust.

4.4 Marital Trust Purposes. The Marital Trust shall be held by the Trustees, separately in trust, for the following purposes:

4.401 Income Distribution. The Trustees shall pay to the surviving spouse of the Undersigned, commencing as of the date of the Undersigned's death, all of the income from the Trust in monthly or other convenient installments, but in no event less frequently than in quarter-annual installments.

4.402 Principal Distribution. Whenever the Trustees determine that the funds available to the surviving spouse of the Undersigned from all sources, including the income from the Marital Trust, are not sufficient for proper care, maintenance, support and travel, including but not limited to the needs arising from illness, accident or misfortune of the surviving spouse of the Undersigned, and funds required to permit the purchase of residences, the Trustees at any time and from time to time may, in their sole discretion, pay or distribute to the surviving spouse of the Undersigned so much of the principal of the Trust as they shall deem necessary or advisable under the circumstances, and the rights of the remainder an in the Trust shall be considered of secondary importance.

4.403 Distribution on Death of Surviving Spouse. Upon the death of the surviving spouse of the Undersigned, the Trustees shall continue to hold and distribute the rest, residue and remainder of this Trust as subject to and under the provisions of Article V; provided, however, that the Trustees may, in their discretion, first pay from the Marital Trust all debts, expenses and death taxes of the Undersigned's spouse.

4.404 Disclaimer. The surviving spouse of the Undersigned, or his or her executor, after the Undersigned's death, may disclaim in writing the surviving spouse's interest in the Marital Trust. If the surviving spouse of the Undersigned disclaims part or all of the interest given to the Marital Trust as referred to in Article IV, the disclaimed properties shall pass to and become part of the Family Trust, and shall be distributed as set forth therein.

4.5 The Initial Corpus and Purposes of the Family Trust. The Family Trust shall contain the balance of the Trust Estate remaining after setting aside all property of the Trust Estate that is included in the Marital Trust. The Family Trust shall not be subject to the payment of the debts and death taxes of the Undersigned. The Family Trust shall be held by the Trustees separately in trust for the following purposes:

4.501 Principal and Income Distribution. During the lifetime of the spouse of the Undersigned, the Trustees may distribute, commencing as of the date of the Undersigned's death, to said spouse and any children or grandchildren of the Undersigned, such part or all of the principal and income of the Family Trust as the Trustees, in their sole discretion, deem necessary or appropriate for the support and maintenance of the surviving spouse and said children and grandchildren in the standard of living to which they are accustomed, including reasonable and adequate health, medical, mental, hospital, nursing and invalidism expenses.

4.502 Primary Consideration of Spouse and Minor Children. In exercising the discretions imposed upon the Trustees, the Trustees are directed that primary consideration be given to the surviving spouse and the surviving minor children, inasmuch as they shall likely be the ones with the greatest needs.

4.503 Exclusive Special Power of Appointment Exercisable Inter Vivos or Testamentarily; Gift Over in Default. Notwithstanding any of the provisions above, during the life or at the death of the surviving spouse of the Undersigned, the Trustees shall hold, administer or distribute the assets of the Family Trust to or for the benefit of any one or more of (i) the Undersigned's issue; (ii) spouses of the Undersigned's deceased issue; or (iii) siblings or any issue of the siblings of the Undersigned, as the surviving spouse of the Undersigned shall appoint by exercise of this exclusive special power of appointment provided herein. Such special power of appointment shall be exercised either inter vivos by a written direction delivered to the Trustees of this Trust or by a Will made after the death of the Undersigned, which specifically refers to the power herein given. Any appointment by the spouse of the Undersigned may be of such estates and interest and upon such terms, trusts, conditions, powers and limitations as the surviving spouse shall determine.

Any appointment may exclude any one or more of the beneficiaries of any enumerated class. If, or to the extent that, the spouse of the Undersigned does not exercise this testamentary special power of appointment, at the death of the spouse of the Undersigned, said assets of the Family Trust shall pass as directed in Article V. However, this special power shall not apply to any trust property which the holder of the power at any time gifted to the Undersigned which would be included in the estate of the holder for federal estate tax purposes if the holder were to leave such a power under IRC 2038.

ARTICLE V

DISPOSITION ON THE DEATH OF THE UNDERSIGNED AND THE UNDERSIGNED'S SPOUSE

All Trust principal with all accumulated income thereof, directed to be disposed of under the provisions of Article V shall, upon the death of the Undersigned and the Undersigned's spouse, be held in trust for the benefit of the then living children of the Undersigned, and the then living issue of any deceased children of the Undersigned, and shall be disposed of as follows:

5.1 Support and Education. All remaining Trust assets (principal and income) shall be held, administered and distributed as follows: Until the youngest living child of the Undersigned is age 32, the Trustees, in their sole discretion, shall distribute such funds from income or principal of the Trust Estate, as they deem necessary for the support, maintenance and education of the Undersigned's children, and grandchildren (if the Trustees deem the grandchildren to be in need); such payments need not be equal in amounts. The Trustees shall take into account the needs, ages, assets and other available sources of income and support of the Undersigned's children. The Undersigned further particularly directs the Trustees that in exercising their discretion hereunder, they should make reasonable allowance for the degree of educational expenses at undergraduate college and post-graduate college level that have been expended for various of their children and that should thereafter be expended for various others of their children, in order to treat their children with some degree of fairness with respect to the receipt of educational funds from them. The Trustees shall determine the amount to be distributed, the beneficiary to whom distributions are to be made, and the time and manner of distributions made under this Section, and shall distribute the amounts according to the various needs of the beneficiaries, even if such distribution is unequal. Any such payment is to be charged against the Trust Estate as a whole, rather than against the ultimate distributive share of the beneficiary to whom payment is made. If amounts are not disbursed under this provision after the youngest living child has reached age 32; then the remainder shall be distributed according to Section 5.2.

5.2 Distribution. When each of the surviving children of the Undersigned attain the following ages: THOMAS W. WARNE, age 60, and JEFFREY D. WARNE age 32, the Trustees shall distribute a share of the remaining principal and income of the Trust Estate which has been divided into as many equal shares as there are children of the Undersigned then living, and children of the Undersigned then deceased with issue then living; provided, further, that each of said equal shares shall either be distributed or held and administered, and later distributed by the Trustees as separate trusts, as follows:

5.201 Living Children. One share shall be set aside in trust for the benefit of each of the Undersigned's children who may then be living and held in trust as follows: A share of the Trust Estate for each surviving child of the Undersigned, when he or she reaches ages specified in section 5.2, shall be distributed to him or her outright upon his or her request therefor. Until distributed, the Trustees, in their sole discretion, may pay the income and principal of said share to said surviving child for his or her support, maintenance, education and for equipment or other facilities to commence a professional practice or otherwise begin his or her life's work, or to purchase a residence as a home and not for speculation. Should any said child die before receiving his or her share, it shall pass to his or her issue by right of representation consistent with and in accordance with the following section, or if not such issue are then living, it shall pass equally to the other Trust shares created by Section 5.2.

5.202 Deceased Children. At such time as a Trust beneficiary (a child of Undersigned) dies, or if said child dies prior to the Undersigned, then the trust share shall continue to be held in Trust for the benefit of living issue, if any, (grandchildren of Undersigned) until the youngest of said children reach the age of 25. Until the youngest said children reach the age of 25, the Trustee shall continue to hold the assets of the trust estate and may invade the income and principal of the Trust for the support, maintenance, medical care and education for the beneficiaries of the Trust as the trustee in the trustee's sole and uncontrolled discretion deems best. At such time as the youngest living child of a deceased child of Undersigned reaches the age of 25, then that Trust shall terminate and be paid out in equal shares by right of representation to the issue of each child of Undersigned for whose benefit the Trust is set up. By way of example, upon the death of THOMAS W. WARNE, the Trust shall continue to be held for the benefit of his issue, if any. At such time as the youngest child of THOMAS W. WARNE reaches the age of 25, the Trust shall terminate and the Trustee shall pay the Trust assets out to the issue of THOMAS W. WARNE by right of representation. In the event a child of Undersigned dies without having issue surviving, then in that event their respective share shall be transferred in equal shares to the other Trusts established for the children of Undersigned pursuant to this paragraph, to be held, administered and distributed in accordance with said Trust terms.

5.3 Alternative Distribution. If all of the above distributions fail, then the Trustee shall distribute the property of this Trust equally to those persons who would constitute heirs at law of the Undersigned, in the proportions provided by the law of descent and distribution of the state whose laws govern this Trust.

ARTICLE VI

TRUSTEE AND EXECUTOR ADMINISTRATIVE PROVISIONS

6 1 In General. The personal representative of the estate of the Undersigned and the Trustees of this Trust shall have as complete power and discretion with respect to administration and management of the Undersigned's estate and this Trust, as the Undersigned had over the Undersigned's property while living; such power and discretion shall include, by way of illustration and not of limitation, and in addition to any inherent, implied or statutory power not inconsistent with the other provisions of this Trust, and the Undersigned's will, the power hereinafter enumerated in this Article. The word "Trustees" hereinafter shall refer to the Trustees of this Trust, and the personal representative of the Undersigned's estate and "Trust Estate" shall refer to the Trust Estate of the Trust and the estate outside of this Trust of the Undersigned.

6.2 Investments. The Trustees may purchase or otherwise acquire and retain, whether originally a part of any Trust Estate hereunder or subsequently acquired, any and all stocks, bonds, notes and other such securities or any variety of real or personal property, including stocks or interests in investment trusts, mutual funds and common trust funds (including common trust funds maintained by the Trustees) as the Trustees may deem advisable, whether or not such investments be of a character permissible for investments by fiduciaries. Investments need not be diversified and may be made or retained with a view toward possible increase in value, notwithstanding the amount or absence of income therefrom.

6.3 Types of Transactions. The Trustees may sell, exchange, lease, pledge, mortgage, transfer, convert, or otherwise dispose of or grant options with respect to any and all properties at any time forming as part of the Trust Estate, in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as the Trustees may deem advisable. Any lease or contract made by the Trustees may extend beyond the period fixed by statute for leases or contracts made by fiduciaries and may extend beyond the duration of any trust hereunder.

6.4 Borrowing. The Trustees may borrow money from any source, including the Trustees, for the benefit of the Trust Estate created hereunder, and as security for any such loan, may mortgage or pledge any property in any Trust Estate created hereunder.

6.5 Management. The Trustees may vote in person or by general or limited proxy with respect to any shares of stock or other securities held by the Trustees, may become a party to or deposit securities or other property under or accept securities issued under any voting trust agreement (whether or not extending beyond the duration of any trust hereunder) and may rescind, terminate or amend any such voting trust agreement, make consents, directly or through a committee or agent, to any recapitalization, reorganization, consolidation, merger, dissolution or liquidation of any corporation, partnership or association in which any Trust created hereunder may have an interest, and may make any payments, assignments, or subscriptions and take any other steps which the Trustees may deem necessary or proper to enable the Trust created hereunder to obtain the benefits of any such transaction.

6.6 Insurance. The Trustees may effect and keep in force life, fire, rent, title, liability or casualty insurance or any other insurance of any nature in any form and in any amount, including without limitation, insurance on or with respect to any dwelling and the contents thereof in which any beneficiaries reside and any automobile which any beneficiary uses, whether or not such dwelling, contents or automobile are part of the Trust Estate.

6.7 Principal and Income. The Trustees may determine what is principal or income of any trust and apportion and allocate in their discretion its receipts, taxes and other expenses and charges between the two. A separate income account need not be maintained. Any income not distributed in accordance with the provisions hereof shall become principal.

6.8 Alternative Valuation Date and Tax Choices. The Trustees, in selecting the valuation date for purposes of federal estate and state death taxes, may select a date which results in the lowest tax burden on the Undersigned's estate, considering the effect of the federal estate tax and all state death taxes, and also income tax of the property included in the Undersigned's estate and the same shall be binding upon all such beneficiaries, without further adjustment to any share or portion due a beneficiary. Trustees may also choose between taking certain deductions as federal income tax deductions or as federal estate deductions, or both. The Trustees shall not restore to principal from income the amount by which the federal estate taxes are increased by the estate's loss of any such deductions.

6.9 Settlement of Claims. The Trustees shall have power to renew, assign, alter, extend, compromise, release, with or without consideration, or submit to arbitration, obligations or claims held by or asserted against the Trust Estate.

6.10 Income and Gift Taxes. The Trustees shall have power to join with the surviving spouse in federal and state income tax returns for any period prior to the first of the Undersigned's death; and also, for federal gift tax purposes, to consent to the splitting of gifts made by the Undersigned to third persons so that such gifts may be treated for the purpose of computing gift tax or refunds, including deficiencies, interest and penalties as they result from so doing, even though not attributable to the Undersigned's own income or property, and even to determine that all sums so payable shall be paid out of the Undersigned's Trust Estate, without giving or obtaining any consideration therefor.

6.11 Trustee Transactions with Other Family Trusts or Estates. The Trustees may enter into any transactions authorized by this Article with any other decedent's estate or any inter vivos or testamentary trust in which the Undersigned or issue or any of them has beneficial interest, even though any fiduciary of such other estate or trust is also a fiduciary under this Trust or the Undersigned's will. The Trustees may enter into any transaction authorized by this Article with the Trustees or legal representatives of any other trust or estate in which any beneficiary hereunder has a beneficial interest even though such Trustee or legal representative is also a Trustee hereunder. Without limiting the generality of the foregoing, the Trustees may advance funds to, purchase assets from, or sell assets to the personal representatives of the estate of the Undersigned and may pay, with or without arrangements for reimbursement, any sums necessary for the settlement of the estate of the Undersigned subject to Section 4.3.

6.12 Reserves for Amortization, Obsolescence, Depreciation and Depletion. The Trustees may charge to operating expense all current costs of amortization, obsolescence, depreciation and depletion of any properties of the Trust and provide adequate reserves for such amortization, obsolescence, depreciation and depletion.

6.13 Agents. The Trustees may hold investments in the name of a nominee and may employ custodians of any Trust property, brokers, agents and attorneys.

6.14 Distribution In Kind. The Trustees may make any distribution or payments in kind, or cause any shares to be composed of cash, property or undivided fractional interests in property different in kind from any other share and determine the value of such shares. The Trustees may acquire assets for distribution in kind to the beneficiaries hereunder.

Such assets may include property, real and personal, stocks, bonds, notes and other securities, life insurance contracts and annuities.

6.15 Trustees Expenses. The Trustees may pay from either income or principal of the Trust the expenses of administering the same. The Trustees shall have a lien on the Trust Estate and may reimburse themselves out of the Trust Estate from either principal or income or from both, all advances made for the benefit or protection of the Trust Estate or its properties and all expenses, loss and liabilities not resulting from the negligence or other default of the Trustees incurred in connection with the administration of the Estate.

6.16 Payments to Minors or Disabled Beneficiaries. If, in the Trustees discretion, any beneficiary (whether under or over age 32) is incapable of making proper disposition of any sum of income or principal that is payable or appointed to said beneficiary under the terms of this Trust Agreement, the Trustees may apply said sum to or on behalf of the beneficiary by one or more of the following methods: (i) by payments on behalf of the beneficiary to any one with whom the beneficiary resides; (ii) by payments in discharge of the beneficiary's bills or debts, including bills for premiums on insurance policies; or (iii) by paying an allowance to the beneficiary directly. The foregoing payments shall be made without regard to other resources of the beneficiary, and without the intervention of any guardian or like fiduciary; provided, however, that the Trustees shall endeavor to apply the funds for the benefit of the beneficiary, that the funds will not be used by any adult person, or any other person for a purpose other than the direct benefit of the beneficiary, and particularly so that said funds will not be diverted from the purpose of support and education of the beneficiary.

6.17 Trustees May Rely on Will. In ascertaining whether there has been an amendment of this Trust by the Last Will and Testament of the Undersigned or whether there has been an exercise of any powers which have been granted to any of the beneficiaries herein and which may be exercised by any such beneficiary's Last Will and Testament, the Trustees shall be protected in relying upon an instrument admitted to probate in any jurisdiction as the Last Will and Testament of the Undersigned or as the Last Will and Testament of any beneficiary who has such power. Unless the Trustees have actual notice of the admission to probate of such a Will within six (6) months after the death of the Undersigned or any such beneficiary, it will be conclusively presumed that no such Will has been admitted to probate, and no such Will exists, and that the Undersigned or beneficiary, as the case may be, died intestate and the Trust Estate shall be administered accordingly, whether or not such Will is thereafter found to exist.

6.18 Commingling. The Trustees may commingle the funds and assets of any Trust Estate hereunder with any other Trust Estate created hereunder so long as proper records are kept of the assets allocable to any such trust. The Trustees shall not be required to physically divide any of the investments or any other property unless necessary or deemed advisable for the purpose of distribution, but may keep the same or any part hereof in one or more funds in which the separate and distinct trust or shares or fraction shall have undivided interests.

6.19 Parties Dealing with the Trustees. No purchaser, and no issuer of any stock, bond or other instrument evidencing a deposit of money or property, or other person dealing with the Trustees hereunder with respect to any properties hereunder as a purchaser, lessee, party to a contract or lease, or in any other capacity whatsoever, shall be under any obligation whatsoever to see to the disbursing of monies paid to the Trustees or to the due execution of this Trust in any particular, but such person shall be absolutely free in dealing with the Trustees on the same basis as though the Trustees were the absolute owners of said property, without any conditions, restrictions or qualifications whatsoever.

6.20 Trustees Liability. No successor Trustee shall be held liable for any mistakes, negligence or willful misconduct of any preceding Trustee. Without limiting the generality of the foregoing, no Trustee shall be held liable for failing to make detailed examinations of the actions or accounts of any preceding Trustee unless such improper actions of the preceding Trustee are brought to the attention of the successor Trustee. An honest, non-negligent error of judgment shall never be cause of liability of any Trustee. The spouse of the Undersigned, or issue of the Undersigned while serving as Trustees shall be liable only for willful fraud. Other Trustees shall be liable for their acts and omissions in accordance with the laws of the State of UTAH.

6.21 Limitations on Power of Individual Trustees. Notwithstanding specific provisions in this instrument to the contrary, any individual serving as a Trustee shall have no voice or power in the determination of distributions of principal (including trust terminations) or accumulations of income for said individual Trustees, or to or for any person to whom said individual Trustee owes a legal obligation of support, nor shall said individual fiduciary have any voice or power in any other determination which would cause Trust principal to be includible in such individual's estate for tax purposes or which would cause Trust income to be taxed to such individual, but such determinations shall be made in the sole discretion and at the direction of any Co-Trustee or successor Trustees. Even though any successor Trustees are not then serving full time, they shall serve as a Trustee for this limited purpose.

6.22 Miscellaneous Trustee Provisions. In order to carry out the provisions of the Trusts created by this instrument, the Trustee shall have the following powers, in addition to those now or hereafter conferred by law, such powers to be exercised in good faith and in accordance with the Trustees' fiduciary obligations:

(a) To lend money to any person, including the probate estate of the Undersigned, provided that any such loan shall be adequately secured and shall bear a reasonable rate of interest.

(b) To purchase property at its fair market value as determined by the Trustees in the Trustees' discretion, from the probate estate of the Undersigned.

(c) To borrow money on such terms and conditions as the Trustees consider advisable, and to encumber Trust property by mortgage, deed of trust, pledge or otherwise for the debt of the Trust or a Co-owner of Trust property.

(d) To commence or defend, at the expense of the Trust, such litigation with respect to the Trust or any property of the Trust Estate as the Trustees consider advisable, and to compromise or otherwise adjust any claims or litigation against or in favor of the Trust.

(e) To withhold from distribution in the Trustees' discretion, at the time for distribution of any property in this Trust, without payment of interest, all or any part of the property, as long as the Trustees, in their discretion, shall determine that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the Estate.

(f) To purchase bonds and to pay such premiums in connection with the purchase as the Trustees, in their discretion, consider advisable; provided, however, that each premium shall be repaid periodically to principal out of the interest on the bond in such reasonable manner as the Trustees shall determine and, to the extent necessary, out of the proceeds on the sale or other disposition of the bond.

(g) To purchase bonds at such discount as the Trustees in their discretion consider advisable; provided, however, that the discount shall be accumulated periodically as interest in such reasonable manner as the Trustees shall determine, and to the extent necessary paid out of the proceeds on the sale or other disposition of the bond or out of principal.

(h) To purchase, in the Trustees discretion, at less than par, obligations of the United States of America issued before March 4, 1971, that are redeemable at par in payment of any federal estate tax liability of the Undersigned, in such amounts as the Trustees deem advisable. The Trustees shall exercise the Trustees discretion and purchase such obligations if the Trustees have reason to believe that the Undersigned is in substantial danger of death, and may borrow funds and give security for that purpose. The Trustees shall resolve any doubt concerning the desirability of making the purchase and its amount in favor of making the purchase and in purchasing a larger, even though somewhat excessive, amount. The Trustees shall not be liable to the Undersigned, any heir of the Undersigned, or any beneficiary of this Trust for losses resulting from purchases made in good faith. The Trustees are directed to redeem any such obligations that are part of Trust corpus to the fullest extent possible in payment of the federal estate tax liability of the Undersigned.

6.23 Income accrued or unpaid on trust property when received into the Trust shall be treated as any other income. Income accrued or held undistributed by the Trustees at the termination of any Trust created herein, except the Marital Trust, shall go to the next beneficiaries of the Trust in proportion to their interest in it. Among successive beneficiaries of this Trust, all taxes and other current expenses shall be prorated over the period to which they relate on a daily basis.

6.24 Notwithstanding anything herein to the contrary, during the lifetime of the surviving spouse of the Undersigned, said spouse shall have the power to require the Trustees to make all or part of the principal of the Marital Trust productive or to convert promptly any unproductive part into productive property. This power shall be exercised by the surviving spouse of the Undersigned in a written instrument delivered to the Trustees.

6.25 Notwithstanding anything to the contrary, it is the Undersigned's intention to have the Marital Trust qualify for the marital deduction under Section 2056 of the Internal Revenue Code and the regulations pertaining to that Section or any corresponding or substitute provisions applicable to the Trust estate. In no event shall the Trustee take any action or have any power that will impair the marital deduction, and all provisions regarding the Marital Trust shall be interpreted to conform to this primary objective.

6.26 For each trust which is otherwise to be established under this Trust instrument and to which any of the Undersigned's generation-skipping exemption is allocated, unless the trust thereby has a generation-skipping inclusion ratio of zero, the Trustee shall instead establish two separate trusts so that each separate trust has a generation-skipping inclusion ratio of either zero (the Exempt Trust) or one (the Nonexempt Trust). This is to be accomplished by allocating to the Nonexempt Trust the minimum amount of property necessary to establish that trust with an inclusion ratio of one, while leaving the Exempt Trust with an inclusion ratio of zero.

ARTICLE VII

TRUSTEE PROVISIONS

7.1 Accounting. With respect to each separate Trust created herein, any corporate Trustee shall render at least annually an account of income and principal, including a statement of all receipts, disbursements and capital changes, to all beneficiaries then eligible to receive income or to the natural or legal guardians of such beneficiaries. However, individual Trustees shall render such annual accounting only if requested by at least one beneficiary of the Trust, and as needed for tax returns. So long as the Undersigned serves as a Trustee of this Trust, an accounting requested by beneficiaries of this Trust shall be limited to a list of assets currently held by the Trustees as part of this Trust. Any time a Trustee resigns, is removed or dies in accordance with Sections 7.5 and 7.10, then the resigning Trustees, the removed Trustees, or the surviving Co-Trustee or successor Trustee, in case of death of a single Trustee, shall submit an accounting to all the living beneficiaries of the Trust who shall object in writing to said Trustee's accounting within sixty (60) days or said accounting shall be deemed approved by the beneficiaries.

7.2 Acting in Other Jurisdictions. If for any reason the Trustee is required or deems it advisable to take any actions in any jurisdiction in which it is not permitted under the laws of such jurisdiction to qualify as a Trustee, the Trustee may appoint to act in such other jurisdiction such person or corporation as the Trustee deems advisable.

7.3 Bond. No bond shall be required of the original Trustees hereunder or of any successor Trustees or, if bond is required by law, no surety on such bond shall be required.

7.4 Compensation. Any individual Trustee shall serve as Trustee without compensation; however, a reasonable compensation shall be paid if the individual Trustee so requests by a writing attached to this Trust, and when a copy of such request is delivered to the then existing income beneficiaries. Any corporate Trustee shall be entitled to a reasonable fee for its services commensurate with fees charged by the Trustee for similar services. Any corporate Trustee may charge a reasonable fee for transfers to a successor Trustee and for any final distribution of any share of the Trust Estate based upon the work involved in such transfer or final distribution.

7.5 Resignation. Any Trustee may resign by giving thirty (30) days written notice to all of the then current, adult, competent beneficiaries of any Trust created hereunder.

7.6 Trustees. The following will act as original Trustees, and as replacement Trustees in the following order of succession:

(a) IRA B. WARNE and AVIS P. WARNE, jointly as original Co-Trustees. If either shall fail or cease to serve, then the survivor shall serve alone.

(b) The following will serve jointly as Successor Trustees:

THOMAS W. WARNE
JEFFREY D. WARNE

In the discretion of the Trustee, additional Trustees may be added in the succession above indicated if more than one trustee is desired. If an institutional trustee is appointed Trustee, then no successor Trustee to said institution need be appointed.

7.7 Dissent Among Trustees. A majority of the Trustees, whether individual or corporate, shall have the power to make any decisions, undertake any action, or execute any documents affecting the Trust created herein. In the event of a difference of opinion among the Trustees, the decision of the majority of them shall prevail, but the dissenting or non-assenting Trustee shall not be responsible for any action taken by the majority pursuant to such decision. After the death of the Undersigned, if only two (2) individual Trustees are in office, they must act unanimously, except when the surviving spouse of the Undersigned serves as Co-Trustee, then said spouse's decision shall be binding. If an individual and a corporate Trustee are in office, the determination of the individual Trustee shall be binding.

7.8 Delegation of Authority. Any Trustee may from time to time delegate to one or more of the remaining Trustees, any powers, duties or discretions. Every such delegation shall be in writing delivered to the delegate or delegates, and shall remain effective for the time therein specified or until earlier revocation by a further writing similarly delivered. Everyone dealing with the Trustees shall be absolutely protected in relying upon the certificate of any Trustee as to who is the acting Trustee or Trustees at the time and as to the extent of their authority by reason of any delegation or otherwise.

7.9 Independence of Court Supervision. In the absence of a breach of trust, no Trustee shall ever be required to qualify before, be appointed by, or account to any court or obtain the order or approval of any court in the exercise of any power of discretion herein given.

7.10 Removal. While the surviving spouse of the Undersigned is a Trust beneficiary under this Trust, said spouse shall have the power to require any existing Trustee to resign, whereupon a successor Trustee shall be appointed as appointed by said spouse, or if the spouse does not appoint a successor then a successor shall be appointed pursuant to paragraph 7.6.

ARTICLE VIII

GENERAL TRUST PROVISIONS

8.1 Insurance.

8.101 Power Of the Undersigned. The Undersigned reserves the right, without the consent or approval of the Trustees, to sell, assign or hypothecate any policies of life or accident insurance made payable to the Trustees hereunder, to exercise any option or privilege granted by such policies, including but without limiting the generality of the foregoing, the right to change the beneficiaries of such policies, and to receive all payments, dividends, surrender values, benefits or privileges of any kind which may accrue on account of such policies during the Undersigned's lifetime. Furthermore, the Trustees agree to deliver to the Undersigned any of such policies deposited with the Trustees hereunder.

8.102 Duties of Trustees. The Trustees shall hold any policies of life or accident insurance which may be deposited with the Trustees, but without any obligation to pay premiums, assessments or other charges upon any of the policies or otherwise to preserve them or any of them as binding contracts of insurance. Upon the death of the insured, or upon the maturity date of any policy assigned or payable to the Trustees, the Trustees shall take such proceedings in their judgment they shall deem necessary to collect all proceeds due on the policies and they may, if they so elect, exercise any settlement options available under the policies. The Trustees are authorized to compromise and adjust claims arising out of such insurance policies, upon such terms and conditions as the Trustees shall deem advisable, and, to the extent necessary, may maintain or defend any dispute; provided, however, the Trustees shall be under no duty to maintain or enter into any litigation unless their expenses, including attorneys fees and costs, have been advanced or guaranteed in an amount and in a manner reasonably satisfactory to the Trustees. The Trustees may repay any advances out of the principal or income of this Trust. The receipt of the Trustees to the insurer shall be a full discharge of the insurer and the Trustees alone shall thereafter be required to see to the application of the proceeds.

8.2 Spendthrift Clause. The interest of each beneficiary in the income or principal of any Trust created hereunder shall be free from the control or interference of any creditor of the beneficiary or any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation. Nothing contained in this Section shall be construed as restricting in any way the exercise of any power or discretion granted hereunder.

8.3 Perpetuity Savings Clause. In any event, and anything to the contrary herein contained notwithstanding, the Trusts created in this Agreement shall terminate upon the day of twenty one (21) years after the death of the Undersigned and the Undersigned's children and grandchildren living at the time this Trust becomes irrevocable, in the event these Trusts shall not have previously terminated in accordance with the terms hereof. In the event of the termination of these Trusts as provided for in this Section, the Trustees shall distribute to the Trust Estate as it shall then be constituted, together with any net income, to the beneficiaries then entitled to the income from the Trust Estate, in the same proportion in which they are entitled to such income.

8.4 Governing Law. This Agreement shall be construed as regulated by the laws of the State of UTAH.

8.5 Definitions. The following are various terms used in the Trust Agreement and the definitions which the Undersigned intend for such terms:

(a) Children. "Children" means the lineal descendants in the first degree of the Undersigned or of such other persons specifically named or indicated by the text or context. "Child" means a single such descendent. The Undersigned intends, for all purposes whatsoever, adopted children of the Undersigned or any other person shall have exactly the same status as natural born children, provided, however, adopted children shall be treated as natural children only if the adoption occurs before the adopted person's 21st birthday. Provided further, however, adopted issue who are also natural issue shall take only in one capacity, such capacity being the one which grants to such issue the larger share.

(b) Issue. "Issue" means children and other lineal descendants of the Undersigned or of such other persons specifically named or indicated by the text or context.

(c) Child in Being. A child who is born alive shall be treated as a child in being during the actual period of gestation for purposes of (i) determining if a person (that is, the Undersigned or any other person) died without children or issue surviving; and (ii) determining if a person is entitled to share in a distribution of Trust principal. All of the rights of such a child shall commence at birth.

(d) "Spouse", "Surviving Spouse", or "Spouse of the Undersigned", shall be deemed to refer to AVIS P. WARNE.

8.6 Invalid Provisions. If any provision of this Trust is held invalid, none of the other provisions shall thereby be rendered invalid or inoperative, but such provisions shall be given full force and effect as herein provided.

8.7 Survivorship. In determining the beneficiaries of the Trust created herein, a beneficiary shall be deemed to have survived the Undersigned, or any other person, a point in time, or an event, as the case may be, only if such survivorship is for at least thirty (30) days. Provided, however, the preceding sentence shall not apply in any case where its application would cause an otherwise valid provision of this Trust to be void because of the rule against perpetuity, the rule limiting suspension of the power of alienation, the rule against accumulation, or any similar rules. Provided further, however, this procedure with respect to survivorship shall not apply as between the Undersigned and the Undersigned's spouse. If there is any question as to the order of their deaths, then such shall be determined in accordance with Sections 4.1.

8.8 Age. A person attains a specific age (for example age 21) at the beginning of the day that forms the coordinate birthday commemoration (for example, 21st birthday). Any person whose birthday falls on February 29 shall be deemed to have a birthday on February 28 for all purposes of this Trust.

8.9 Number and Gender. The singular shall be interpreted as the plural and vice-versa, if such treatment is necessary to interpret this Trust in accordance with the manifest intention of the Undersigned. Likewise, if either the feminine, masculine or neuter gender should be one of the other genders, it shall be so treated.

8.10 Paragraph Headings. The paragraph and other headings used herein are merely indices for convenience and shall not be used in the interpretation of this instrument.

8.11 Notification of Attorney. If the Undersigned has a serious illness or operation, the Undersigned requests that the Trustees contact his attorney, JOSEPH L. PLATT, 1313 W. 1800 N , FARMINGTON, UTAH 84025 801-451-7616 to obtain instructions in case the Undersigned should die

IN WITNESS WHEREOF, the Undersigned has executed this Trust Agreement.

Ira B. Warne
IRA B. WARNE, Undersigned

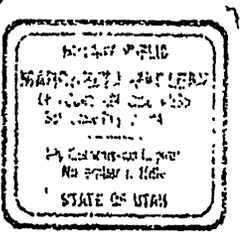
Ira B. Warne
IRA B. WARNE, Co-Trustee

Avis P. Warne
AVIS P. WARNE, Co-Trustee

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 15th day of July, 1991, personally appeared before me, a Notary Public in and for said County and State, IRA B. WARNE and AVIS P. WARNE, known to me to be the persons whose names are subscribed to the foregoing Family Living Trust, and acknowledged to me that they executed the same.

NOTARY PUBLIC



SCHEDULE "A"

SEPARATE PROPERTY OF THE IRA B. WARNE
FAMILY LIVING TRUST

FOR TEN DOLLARS ($10.00), and other good and valuable consideration, the Undersigned, as Grantor, hereby transfers, sells, assigns, and conveys the below-listed property with all right, title, interest and obligations pertaining thereto, to the Trustees, subject to the terms and conditions of the IRA B. WARNE Family Living Trust, dated the 5th day of July, 1991.

PROPERTY DESCRIPTION

GRANTOR'S INITIALS

IBW

ALL PROPERTY - SEE EXHIBIT 1
Placed into the trust on the 15th day of July, 1991.

1. Any and all personal property now owned or hereafter acquired by the Undersigned.

Ira B. Warne
IRA B. WARNE, Undersigned

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On this 15th day of July, 1991, personally appeared before me IRA B. WARNE, whose name is subscribed to the foregoing Schedule "A", and acknowledged to me that he executed the same.

NOTARY PUBLIC

NOTARY PUBLIC
MARGARET L. MACLEAN
[illegible]
My Commission Expires
November 1, 1994
STATE OF UTAH

We hereby certify that we have read the foregoing Trust and that it correctly states the terms and conditions under which the Trust estate is to be held, managed, and disposed of by the Trustees. We approve the declaration of Trust in all particulars and request the Trustees to execute it.

We further state that any properties transferred to this Trust which constitute community property pursuant to the laws of any community property state having jurisdiction over such property, then such property shall retain its character as community property while held in said Trust until the earlier of the date of the death of the person who created this Trust, or said person's spouse. In addition, if any property is removed from this Trust such property shall continue to maintain its character as either community or separate property depending upon what kind of property it is.

Ira B. Warne
IRA B. WARNE

Avis P. Warne
AVIS P. WARNE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 15th day of July, 1991, personally appeared before me, IRA B. WARNE and AVIS P. WARNE, known to me to be the persons who executed the foregoing instrument.

NOTARY PUBLIC

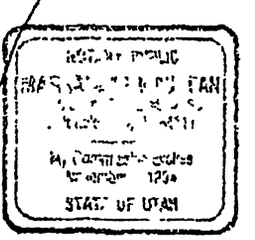


EXHIBIT 1 TO SCHEDULE A

FAMILY PROTECTION FINANCIAL SUMMARY SHEET
As of the 15th day of July, 1991

IRA B. WARNE FAMILY PROTECTION TRUST

This is a summary page of individual asset schedules
on file with my attorney, Joseph L. Platt

ASSETS	PROPERTY VALUE
BANK ACCOUNTS	$44,000.00
SECURITIES (STOCKS, BONDS, ETC.)	$94,880.00
PENSION & PROFIT SHARING PLANS, IRAs,	$30,000.00
PERSONAL AND HOUSEHOLD ARTICLES	$78,000.00
TOTAL ASSETS:	**$246,880.00**
TOTAL DEBT:	**$35,000.00**
Γ ASSETS:	**$211,880.00**

Tab H

Partial Revocation of and Amendment to The Ira B. Warne Family Protection Trust

WHEREAS, the undersigned, Ira B. Warne as Grantor, and Ira B. Warne and Avis P. Warne as Trustees, executed The Ira B. Warne Family Protection Trust ("Trust Agreement") on 15 July 1991; and

WHEREAS, Avis P. Warne is deceased, and pursuant to paragraph 7.6 of Article VII, "Trustee Provisions" (which states that if one of the Trustees ceases to serve, the other shall serve alone), Ira B. Warne is authorized to act as the sole Trustee of the Ira B. Warne Family Protection Trust; and

WHEREAS, under Article III, titled "Amendment, Revocation and Additions to Trust," paragraph 3.1, titled "Rights of the Undersigned," Grantor reserves the right to amend, modify, or revoke the Trust Agreement in whole or in part; and

WHEREAS, Grantor specifically wishes to preempt the results of the case Banks v. Means, 452 Utah Adv. Rep. 10, 2002 UT 65 (2002); and

WHEREAS, Grantor interprets the phrase "until this Trust is revoked" found in paragraph 3.2 to mean "revocation . . . of this Trust . . . in whole or in part" (paragraph 3.1), rather than "revocation of this instrument in its entirety" (paragraph 3.1), noting that the latter phrase is used to define the specific and narrow circumstance and time as to when the Trustees are to deliver all trust property to the Undersigned, thus indicating that the word "revoked" found in paragraph 3.2 in fact means "revoked in whole or in part";

NOW, THEREFORE, the Grantor hereby revokes the Trust Agreement, in part, as follows, thereby terminating the presently vested interest of the beneficiaries under paragraph 3.2; and further amends the Trust Agreement as set forth herein:

A. <u>Provisions to be Revoked</u>. The Grantor hereby revokes paragraphs 1.1 and 1.2 of Article I titled, "Purposes and Birth Dates," which begin with the words "Purpose of the Trust"

I.B.W.
Ira B. Warne

and which end with the words ". . . the Trustee for all purposes." The remaining paragraph of said Article I shall remain intact.

The Grantor further revokes paragraph 3.2 of Article III titled, "Amendment, Revocation and Additions to Trust" which begins with the words "Interests of the Beneficiaries" and which ends with the words "in their fiduciary capacity." The remaining paragraphs of said Article III shall remain intact.

The Grantor further revokes and deletes in its entirety Article V titled, "Disposition on the Death of the Undersigned and the Undersigned's Spouse"

Finally, the Grantor revokes paragraph 7.6 of Article VII, titled, "Trustee Provisions" which begins with the words "Trustees. The following will act . . ." and which ends with the words "need be appointed." The remaining paragraphs of said Article VII shall remain intact.

B. Provisions to be Inserted. The Grantor inserts the following paragraphs in the appropriate place in the Trust Agreement and declares said provisions to express his desires and intent (provisions to be inserted are shaded):

ARTICLE I
PURPOSES AND BIRTH DATES

1.1 **Purpose of the Trust.** This Trust is established to dispose of the Undersigned's assets as set forth herein, particularly in the distribution provisions found in Article V titled, "Disposition on the Death of the Undersigned and the Undersigned's Spouse."

1.2 **Primary Beneficiaries.** Following the Grantor's death, the Trustees shall distribute, pursuant to the terms of this Agreement, Trust Assets to the Primary Beneficiaries, who include those, and only those, listed by name or referred to as follows:

Name	Birthdate	Relationship or Interest
Jeffrey D. Warne	30 August 1957	Son

The Undersigned has in mind but makes no provision herein for Thomas W. Warne, or his issue, or any other individual not specifically referred to in the Agreement by name or class, whether an heir or not. Notwithstanding anything to the contrary in this Agreement, said individuals shall not be deemed "Beneficiaries" as those terms are

I.B.W.
Ira B. Warne

defined in the Trust Agreement or in this Amendment, and shall not be entitled to receipt of any Trust assets. This pretermission is intentional and binding.

The Grantor inserts the following paragraphs in the appropriate place in the Trust Agreement and declares said provisions to express his desires and intent (provisions to be inserted are shaded):

ARTICLE III
AMENDMENT, REVOCATION AND ADDITIONS TO TRUST

3.2 Interests of the Beneficiaries Limited. The Undersigned intends that Trust assets be protected in the following manner. Any interest of any Beneficiary in any assets of the Trust or in income or principal related to any asset of the Trust is under the sole and absolute control of the Trustees until the Trustees actually distribute said interest to the Beneficiary. That is, a Beneficiary's rights in any asset of the Trust or in income or principal related to any asset of the Trust do not vest until actual distribution or alienation of said interest by the Trustees to said Beneficiary pursuant to the distribution provisions of the Trust. Because the assets do not vest in the Beneficiary prior to distribution, said assets are free, until distribution, from the control and interference of any creditor of any Beneficiary, the parent of any Beneficiary, the issue of any Beneficiary, the betrothed of any Beneficiary, the spouse of any married Beneficiary, or the divorced spouse of any Beneficiary, and a Beneficiary shall have no power to pledge, assign, mortgage, sell, or in any manner transfer or hypothecate any interest that said Beneficiary may have or may expect to have in any assets of the Trust or in income or principal related to any asset of the Trust. Nor shall any Beneficiary have any power in any manner to anticipate, alienate, charge, or encumber his or her interest, whether in an asset, income, or principal of the Trust except as may be otherwise expressly provided in this Agreement. Nor shall any interest of any Beneficiary be liable or subject in any manner while in the possession of the Trustees for the debts, contracts, liabilities, engagements, obligations, or torts of said Beneficiary.

The Grantor inserts the following Article V in the appropriate place in the Trust Agreement and declares said provisions to express his desires and intent (provisions to be inserted are shaded):

ARTICLE V
DISPOSITION ON THE DEATH OF THE UNDERSIGNED AND THE UNDERSIGNED'S SPOUSE

All Trust principal, with all accumulated income thereof, directed to be disposed of under the provisions of this Article V shall, upon the death of the Undersigned and the Undersigned's spouse, be disposed of as follows:

I.B.W.

Ira B. Warne

5.1 Asset Apportionment And Distribution. The Trustees will set aside all the Trust assets into a trust called the "Jeffrey D. Warne Beneficiary Trust." The Trustees will then distribute those assets outright and immediately to Jeff.

5.2 If The Primary Beneficiary Cannot Receive His Beneficiary Trust. If Jeffrey D. Warne cannot receive all or part of his Beneficiary Trust for any reason, then the Trustees will divide that Primary Beneficiary's share as follows:

5.201 If The Primary Beneficiary Cannot Claim And Has Issue. If Jeffrey D. Warne cannot claim for any reason, and he has children or grandchildren (that is, issue), then you will divide all Jeff's share among his issue by right of representation.

The Trustees will set aside the issue's shares into separate trusts called "Issue Trusts." The Trustees will distribute Issue Trust assets to a particular issue in sufficient amounts to pay for said issue's tuition, books, and room and board to a post-secondary educational institution. The Trustees will distribute any remaining funds (or all the funds if said issue does not attend a post-secondary educational institution) to said issue when he or she reaches the age of 25.

5.202 If The Primary Beneficiary Cannot Claim And Has No Issue. If Jeffrey D. Warne cannot claim all his share for any reason, and he has no issue, who can claim, then all that Beneficiary's share will be apportioned to the Morganville United Methodist Church in Morganville, New Jersey and distributed outright and immediately.

The Grantor inserts the following paragraph in the appropriate place in the Trust Agreement and declares said provisions to express his desires and intent (provisions to be inserted are shaded):

ARTICLE VI
TRUSTEE PROVISIONS

6.6 Trustees. The following will act as Original Trustee:

(a) Ira B. Warne

Upon the death of the Undersigned, the following will act as Successor Trustee:

(b) Jeffrey D. Warne

I. B. W
Ira B. Warne

C. **Confirmation of Trust Agreement**. Except as otherwise specifically noted in this Amendment, Ira B. Warne ratifies and confirms all the provisions of The Ira B. Warne Family Protection Trust, dated July 15, 1991.

THIS AMENDMENT TO THE TRUST AGREEMENT consists of 7 pages (including those pages containing the "Attestation and Statement of Witnesses") and shall govern the administration of The Ira B. Warne Family Protection Trust.

IN WITNESS WHEREOF, the Grantor and Trustee have executed this Amendment to The Ira B. Warne Family Protection Trust on this 9 day of May 2003.

Ira B. Warne

Ira B. Warne/Grantor and Trustee

Ira B. Warne, 5/9/03

ATTESTATION AND STATEMENT OF WITNESSES

STATE OF UTAH)
: ss.
County of Salt Lake)

We, Trina Bailey and Leigh Webster, being duly sworn individually and severally, do hereby depose and state under oath:

1. Ira B. Warne (the "Grantor") declared to us that the attached document–titled "Amendment To The Ira B. Warne Family Protection Trust" (the "Amendment")–is his Amendment; that he is familiar with its contents; and that it reflects his desires. The Grantor further requested that we witness his sign said Amendment.

2. In the Grantor's presence and sight and in the presence and sight of each other, we witnessed the Grantor sign the Amendment at the end thereof and further witnessed the Grantor initial or sign the Amendment on each page preceding the Grantor's signature at the end thereof.

3. At the time of signing the Amendment, the Grantor was older than eighteen years of age.

4. Based on our conversations with the Grantor and the Grantor's answers to certain questions, we are of the opinion that the Grantor could converse in and read the English language; suffered no physical impairment preventing the creation and execution of a valid Amendment; was of sound mind, memory, and understanding; was free from the influence of alcohol or drugs; was under no duress, fraud, constraint, or undue influence from or by any person to sign the Amendment; and signed it voluntarily and willingly.

5. We are not related to the Grantor by blood, marriage, or adoption, and to the best of our knowledge, we are not entitled to any part of the Grantor's estate upon the Grantor's death under any testamentary document now existing or which may exist by operation of law.

6. The person whom we witnessed sign the Amendment as Grantor is known to us personally or proved to us on the basis of convincing evidence to be Ira B. Warne.

7. This "Attestation and Statement of Witnesses" is attached to the Amendment, which consists of 7 pages, including this Attestation and Statement.

DATED this 9 day of May 2003.

1. Trina Bailey residing at 14464 N Oracle Rd
Witness Signature Street Address

Trina Bailey Tucson Az 85704
Print Name City, State, Zip Code

520-784-5064
Telephone Number

OFFICIAL SEAL
CATHY BYROAD
NOTARY PUBLIC-ARIZONA
PIMA COUNTY
My Comm. Expires Aug. 9, 2004

2. Leigh Webster residing at 6464 N Oracle Rd
Witness Signature Street Address

Leigh Webster Tucson, AZ 85704
Print Name City, State, Zip Code

(520) 478-5119
Telephone Number

On this 9th day of May 2003, before me, a Notary Public, personally appeared Trina Bailey and Leigh Webster, personally known to me or proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed as Witnesses to this "Attestation and Statement of Witnesses."

SEVERALLY SUBSCRIBED AND SWORN to before me this 9th day of May 2003.

OFFICIAL SEAL
CATHY BYROAD
NOTARY PUBLIC-ARIZONA
PIMA COUNTY
My Comm. Expires Aug. 9, 2004

Notary Public

Tab I

Codicil To
The Last Will and Testament of
Ira B. Warne

I, Ira B. Warne, residing at 2863 East Saint Mary's Way, Salt Lake City, Utah and being of sound and disposing mind and memory and free from all menace, fraud, duress, or undue influence, on this 9 day of MAY 2003, do hereby make, publish, and declare this to be a codicil to my Last Will and Testament, dated 15 July 1991 (the "Will"), in the manner and form following:

1. **Fiduciaries**. I wish to delete paragraph 3.1 of Article III of my will, which begins with the words "Designation of Personal Representative" and ends with the words ". . . Jeffrey D. Warne." I wish to insert the following provisions in place of the deleted paragraph (*provisions to be inserted are shaded*):

ARTICLE III
DESIGNATION OF FIDUCIARIES

3.1 Designation Of Personal Representative. I nominate the following as personal representative of my estate.

Jeffrey D. Warne

2. **Remaining Provisions**. All other terms, conditions, distributions, and provisions of my Will are hereby republished, and shall remain in force and effect.

THIS CODICIL TO MY WILL consists of 3 pages (including those pages containing the "Attestation and Statement of Witnesses") and shall govern the administration of my Will.

IN WITNESS WHEREOF, I have executed this Codicil to my Will on this 9 day of MAY 2003.

Ira B. Warne

Ira B. Warne, Testator

ATTESTATION AND STATEMENT OF WITNESSES

STATE OF UTAH)
: ss.
County of Salt Lake)

We, Trina Bailey and Leigh Webster, being duly sworn individually and severally, do hereby depose and state under oath:

1. Ira B. Warne (the "Testator") declared to us that the attached document titled "Codicil To The Last Will of Ira B. Warne" (the "Codicil") was his Codicil and requested that we witness his sign said Codicil.

2. In the Testator's presence and sight and in the presence and sight of each other, we witnessed the Testator sign the Codicil at the end thereof and further witnessed the Testator initial or sign the Codicil on each page preceding the Testator's signature at the end thereof.

3. At the time of signing the Codicil, the Testator was older than eighteen years of age and, in our respective opinions, could converse in and read the English language; suffered no physical impairment preventing the creation and execution of a valid Codicil; was of sound mind, memory, and understanding; was free from the influence of alcohol or drugs; was under no duress, fraud, constraint or undue influence from or by any person; and signed the Codicil voluntarily and willingly.

4. We are not related to the Testator by blood, marriage, or adoption, and to the best of our knowledge, we are not entitled to any part of the Testator's estate upon the Testator's death under any testamentary document now existing or which may exist by operation of law.

5. The person whom we witnessed sign the Codicil as Testator is known to us personally or proved to us on the basis of convincing evidence to be Ira B. Warne.

6. This "Attestation and Statement of Witnesses" is attached to the Codicil, which consists of 3 pages, including this Attestation and Statement.

DATED this 9 day of May 2003.

1. Trina Bailey residing at 6464 N Oracle Rd
Witness Signature Street Address

Trina Bailey Tucson AZ 85704
Print Name City, State, Zip Code

520-784-5064
Telephone Number

2 Leigh Webster residing at 6464 N Oracle Rd
Witness Signature Street Address

Leigh Webster Tucson, AZ 85704
Print Name City, State, Zip Code

(520) 478 5119
Telephone Number

On this 9th day of May 2003, before me, a Notary Public, personally appeared Tina Bailey and Leigh Webster, personally known to me or proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed as Witnesses to this "Attestation and Statement of Witnesses"

SEVERALLY SUBSCRIBED AND SWORN to before me this 9th day of May 2003

Notary Public

OFFICIAL SEAL
CATHY BYRROAD
NOTARY PUBLIC-ARIZONA
PIMA COUNTY
My Comm. Expires Aug. 9, 2004

Tab J

LAST WILL AND TESTAMENT
OF
IRA B. WARNE

I, IRA B. WARNE, of SALT LAKE CITY, SALT LAKE County, State of UTAH, declare this to be my Last Will and Testament and revoke all earlier Wills and Codicils. In this Will I expressly do not exercise any power of appointment which now or hereafter may be conferred upon me by anyone, either by will or in any other manner. Otherwise, I intend by this Will to dispose of all property which I now own or over which I have the power of disposition.

ARTICLE I

1. Marital Status and Heirs. I am married to AVIS P. WARNE and all references to my spouse are to AVIS P. WARNE only. The children of the Undersigned consists of the following:

THOMAS W. WARNE, July 15, 1943
JEFFREY D. WARNE, August 30, 1957

All references to my children are to such children and to any child subsequently born to or legally adopted by me.

I do not intend to make bequests or devises in this Will to my spouse, to my children, or to the issue of any deceased child of mine, except as such bequests or devises may be specifically provided for in this Will.

ARTICLE II

DISPOSITION OF ESTATE

2.1(a) Tangible Personal Property - Gift by Written Statement. I give my tangible personal property not otherwise specifically devised in this Will, except any such property which, at the time of my death, is used in a trade or business, in accordance with a written statement signed by me or in my handwriting which I intend to leave at my death.

2.1(b) Contingent Gift. I give all of my tangible personal property not effectively disposed of by such written statement, or otherwise specifically devised in this Will, except any such property which, at the time of my death, is used in a trade or business, to my spouse if my spouse survives me. If my spouse fails to survive me, I give such property to my issue who survive me, by representation, to be divided among them as they shall agree, or if they shall fail to agree within six (6) months after the appointment of my personal representative, to be divided among them in portions of approximately equal value (adjusted by the principle of representation, if applicable), as determined by my personal representative. If any such issue is under the age of 18 at the time of such division, the person having custody of such issue shall represent him/her for all purposes of this paragraph, and the receipt of such person shall discharge my personal representative from all responsibility for the proper application of the property so receipted for.

2.2 Pour-Over to Family Protection Trust. On the 15th day of July, 1991, I executed a written Trust Agreement entitled the IRA B. WARNE Family Protection Trust with IRA B. WARNE and AVIS P. WARNE as Trustees. I hereby confirm such Trust. That Trust and this Will form part of an integrated plan to provide for the disposition of my estate upon my death and both instruments should be construed and administered accordingly. I hereby give, devise and bequeath all of my property, not effectively disposed of by the above described written statement or by other provisions of this Will, whether real, personal, or mixed, and wherever situate to the Trustee of such Trust, in trust, to be administered and distributed pursuant to the provisions of such Trust including any amendments made subsequent to the execution of this Will that are in effect at the time of my death. It is my intention not to create a separate trust by this Will nor to subject the above described Trust or the property added to it by this Will to the jurisdiction of any probate or similar court. I make no additional provisions herein for my spouse or children because they are provided for in said Trust. In the event said Trust is revoked by me prior to my death or in the event the same is otherwise not effective, or the residue of my estate is not conveyed to it by this Will, I hereby give, devise and bequeath all of the rest, residue and remainder of my estate both real, personal and mixed and wherever situate to the Trustees named above or to the successor Trustees, in trust, in accordance with the terms of said Trust executed on the 15th day of July, 1991, without giving effect to any amendments made subsequently, which Trust is incorporated herein by reference.

ARTICLE III

DESIGNATION OF FIDUCIARIES

3.1 Designation of Personal Representative. I nominate the following as personal representative(s) of my estate, to act jointly.

THOMAS W. WARNE
JEFFREY D. WARNE

3.2 Designation of Guardian. I nominate and appoint the following as guardian(s) of the person of each child of mine who is a minor or under other legal disability, to act in the sequence named, each to serve in the event the preceding person or persons, as applicable, fails to qualify or after qualifying fails to act:

N/A

3.3 Designation of Conservator. I nominate the following as conservator(s) of the estate of each child of mine who is a minor or under legal disability, to act jointly.

THOMAS W. WARNE
JEFFREY D. WARNE

3.4 Bonds Waived. I direct that each fiduciary, including successors, shall be permitted to qualify without the necessity of giving a bond or other undertaking in this or any other jurisdiction for the faithful performance of such fiduciary's duties, or if any bond shall be required by law, statute or rule of court, without the necessity of sureties thereon.

3.5 Fiduciary Powers. My fiduciaries may exercise all the powers in the UTAH Uniform Probate Code, including provisions granted by amendment after the date of my Will and after my death.

3.6 Incorporation by Reference. For purposes of the administration of my estate in any jurisdiction other than UTAH, the UTAH Uniform Trustee's Provisions as they exist on the date of the execution of this Will, and any additional powers subsequently granted by law or statute in UTAH up to the date of my death, are incorporated herein by reference and shall be effective as fully as if they were set out at length in this Will, and my fiduciaries shall have, in addition to the powers expressly granted in this Will, all of the powers conferred or provided for by said Provisions to the extent that such powers are consistent with the powers expressly granted in this Will.

ARTICLE IV

EXPENSES OF ADMINISTRATION

4.1 Pursuant to the provisions of the written trust agreement described in paragraph 2.2 herein, the Trustee has discretion to use certain properties of the trust estate for the purpose of paying my debts and expenses of last illness, burial and administration of my estate and all taxes arising at or because of my death, together with interest and penalties thereon, if any. My Personal Representative shall cooperate with the Trustee in determining the source from which such debts, expenses and death taxes are to be paid, using assets of my estate, properties of the trust estate, or both to the extent appropriate. All estate, inheritance and other taxes payable by reason of my death, including taxes with respect to property not passing under this Will, shall be paid as expenses of administration and such expenses and other expenses of administration shall be paid from the residue of my estate or said Trust without contribution from any person and without apportionment except as apportioned in said Trust.

ARTICLE V

MISCELLANEOUS

5.1 Governing Law. This Will has been drawn and executed in the State of UTAH. All questions concerning the meaning and intention of any of its terms, its validity, or the exercise of any power of appointment created herein shall be determined in accordance with the laws of the State of UTAH.

5.2 Definitions. Definitions of terms in my Will shall be as defined in the UTAH Uniform Probate Code in effect at my death.

5.3 Intentional Omission of Heirs. I have in mind all persons who are natural objects of my bounty. Except as expressly provided in this instrument, I have intentionally omitted to provide herein for any person claiming to be an heir of mine.

5.4 Transactions with Trustees. My Personal Representative, in its discretion, may purchase assets from any trust created by me and may sell any assets in my estate to the Trustee of any trust created by me at their fair market value as determined by the Personal Representative and the Trustee. To the extent permitted by law, such sales or loans may be made without court order or confirmation and I expressly exonerate my Personal Representative and the Trustee from any and all liability connected herewith.

IN WITNESS WHEREOF, I, IRA B. WARNE, the testator, sign my name to this instrument this 15th day of July, 1991, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Ira B. Warne
IRA B. WARNE, Testator

We, ROBIN R. BOYD and BETTY D. BLANK, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument in our presence as his last Will and he signs it willingly, and that he executes it as his free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator and of each other, hereby signs this Will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Robin R. Boyd
ROBIN R. BOYD, Witness
1141 North Redwood Road, #88
Salt Lake City, Utah 84116

Betty D. Blank
BETTY D. BLANK, Witness
5554 South 235 East
Murray, Utah 84107

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Subscribed, sworn to and acknowledged before me by IRA B. WARNE, the testator, and subscribed and sworn to before me by ROBIN R. BOYD and BETTY D. BLANK, witnesses, this 15th day of July, 1991.

Notary Public

NOTARY PUBLIC
[illegible] MACLEAN
[illegible]
My Commission Expires
[illegible] 1994
STATE OF UTAH

MEMORANDUM OF DISPOSITION
OF
PERSONAL PROPERTY
OF
IRA B. WARNE

Paragraph 2.1 of my Will, executed on July 15, 1991 distributes items of my tangible personal property (not money, evidences of indebtedness, documents of title, stock certificates or business property) in accordance with this writing; I hereby make this memorandum for that purpose and to comply with the provisions of Utah Code Ann 75-2-513 (1953, as amended).

	Description of Item	Recipient
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		

Dated this _____ day of _____, 19 ____

_____
IRA B. WARNE